**Business Structures:**
What types of business structures are permitted?

One main decision for a foreign entity deciding to establish a business in Canada is whether to carry on that business directly, as a branch of that foreign entity or should be created as a separate Canadian business organization such as a subsidiary corporation with either limited or unlimited liability, depending on the province. Other options include:

A proprietorship which is the simplest form of business organization and is when an individual carries on as the sole owner without incorporating. The proprietor’s liabilities are the owner’s personal liabilities.

A partnership where two or more individuals carry on business together with a view of making profit without incorporating. In an ordinary partnership all of the legal liabilities are the personal liabilities of the partners. A limited partnership means that the general partner has unlimited liability whereas the limited partner is limited to the amount of liability that they contribute to the business.

A limited liability partnership is also allowed in some provinces for professional firms such as law firms and accounting firms and in British Columbia it can be used for any type of business venture. This means that the partner is only liable for the partner’s own negligent or wrongful acts or omissions or for the negligent or wrongful acts or omissions of another partner or employee of the partnership if the partner knew about such acts or omissions.

Joint venture generally refers to any means whereby two or more economic entities share in a common venture. This can refer to joint venture corporations, to partnerships of corporations, or to a structure under which separate corporations own certain assets in common with the expectation that the venture does not constitute a partnership at least for tax purposes.

If a foreign entity carries on business in Canada through a branch they will be subject to all the same federal and provincial registration requirements that would apply to a corporation.

**Taxation:**
Briefly explain the country’s tax regime including rates and how rates differ based on business structures.

Canadian residents are taxed on their worldwide income whereas non-residents are taxed on Canadian source income which generally includes income that arises from employment in Canada, a business carried on in Canada, or the disposition of taxable Canadian property. A corporation is deemed to be a resident of Canada if it was incorporated in Canada any time after April 26, 1965. In addition, a corporation incorporated in a foreign jurisdiction will be a resident if the directors meet in Canada, or if the control over the corporation is in Canada.

The federal income tax rate for corporations is 15%. On top of this each province has a different tax rate ranging from 11% in BC to 16% in Nova Scotia and Prince Edward Island for a combined rate of between 26% and 31%. Corporations must file a corporate income tax return within six months of their taxation year.

There is also a branch tax imposed on any non-resident corporation carrying on business in Canada. It’s meant to be a proxy for Canadian non-resident withholding tax on dividends, paid by a Canadian subsidiary to its non-resident parent corporation.
Generally all people who are not Canadian citizens or permanent residents require a work permit to work in Canada. A work permit is normally only granted where there is no qualified Canadian available to fill the position in question. However, there are many exceptions to this rule.

A person may enter Canada as a business visitor without the need for a work permit if the person seeks to engage in international business activities in Canada without directly entering the Canadian labour market. This will be considered to be the case if the primary profit is outside of Canada and the principal place of business and accrual of profits of the employer remains predominately outside of Canada. Or if the services rendered do not directly compete directly with those rendered by Canadian citizens or permanent residents.

As well, a representative of a business outside Canada may work in Canada without a work permit if the purpose of his or her visit is to attend meetings, to purchase Canadian goods or services, or to give or receive training within a Canadian parent or subsidiary company of his or her employer.

A new short term exemption to a work permit was introduced on June 12 2017 and it is referred to as global skills strategy. This is where the foreign national is coming to work for 15 consecutive days or at least six months have passed since the last day of work done under this exemption or 30 days or less and 12 months have passed since the last use of this exemption. And the work is highly skilled in that the skill level falls in 0 or A in the national occupational classification.

Inter-company transferee is one of the quickest category for certain business peoples to work in Canada. It can only be people in senior executive or managerial positions or positions requiring special knowledge regarding the employer’s products, services, or processes and procedures, who have been an employee of the parent company outside of Canada for at least one year and seek to enter Canada to work at senior or managerial levels.

Another category is that of creating significant employment or other benefits in Canada. This is available if the person’s employment will create or maintain employment or other benefits in Canada. These are often only granted in extraordinary circumstances.

Entry under trade agreements is another category and has to do with the agreements that Canada is a party to such as NAFTA, the general agreement on trade in Services, and the Canada European Union comprehensive economic and trade agreement. Three categories of work permits are allowed under this category: a. Traders and investors; b. professionals including contractual service suppliers and independent professionals; and c. intracompany transferees.

Finally, where there is a job offer. They must be satisfied that there was no more qualified Canadian citizen or resident or at least that none were negatively impacted.

These permits allow for spouses and children to enter the country as well, but not to work. But the spouse may be able to obtain a work permit under the spouses work permit plan.
### Foreign Investment Review and Issues: Does the government review and approve foreign investments? What factors are considered?

Yes the government does review foreign investments using the Investment Canada Act. Foreign investments are broken into two categories: investments that are subject to notification and investments that are reviewable. They are reviewable in the following three situations.

1. The investor is from a World Trade Organization (WTO) member country and the investment is made to directly acquire ownership and control of a non-cultural Canadian business that has assets over $312 million. For non-WTO members the threshold is $5 million or more for direct acquisitions and $50 million or more for indirect.
2. The investment is made to directly acquire control of a cultural business that has assets of $5 million or more or the Canadian government has decided that it should be reviewed in the public interest.
3. The Canadian government considers that the investment may be injurious to national security.

The factors that are considered are:
1. The effect of the investment on economic activity in Canada;
2. The degree of participation by Canadians in the business in question;
3. The effect of the business on efficiency, productivity, technological development, product innovation and product variety in Canada;
4. The effect of the investment on competition.
5. The compatibility of the investment with national, industrial, and cultural policies; and
6. The contribution to Canada being able to compete globally.

### Dealing with the Government: Identify major issues when dealing with local and federal governments.

Canada is split up into two systems. We have English common law which is practiced in nine provinces and three territories and French civil law which is practiced in one province (Quebec). Canada is considered a federal state where some powers are given to the federal government and others to the provincial government.

For businesses, the provincial laws often have more power over them because provincial governments have power over property and civil rights which includes contract law, labour relations, occupational health and safety, consumer protection, real estate transactions, land use, municipal law, securities law and regulation of professionals.

Federal laws are more narrowly focused. For example, banks are under federal power. It can be confusing at times because different aspects of business can be regulated at a different level. For example, employee’s relations with their employers is provincial, but if that business is federal such as a bank or railway then they are under a federal labour code.

Furthermore, all major insurance companies are federally chartered and so their governance and prudential practices are governed federally, but their marketing, policies, and relationships with policy holders are subject to provincial insurance laws.

This is further complicated because some provinces can opt out of federal programs, such as Quebec offering their own pension plan instead of the Canada pension plan.
**Dispute Resolution and Court Systems:** Summarize the court system, including the use of juries and arbitration.

The Canadian court system is mostly unitary. There is a specialized federal court system which has both a trial and an appellate level. It has jurisdiction over areas such as immigration, citizenship, appeals from federal administrative tribunals, actions against the federal crown, tax, intellectual property, and navigation and shipping and virtually all maritime law. All other litigation is dealt with through the provincial superior courts, which can then be appealed to the court of appeal. The supreme court of Canada hears cases both from the federal court and from the provincial court of appeal.

Often parties will both voluntarily and not voluntarily take their issues to mediation where a trained mediator oversees these and helps facilitate a decision. Also often times a case will go to arbitration instead of trial and this is when a third party makes a decision for the parties in a less formal setting than the court system. There are also tribunal boards set up for special areas such as for regulatory matters and human rights.

**Foreign Corrupt Practices:** What are the anti-corruption, anti-bribery and economic sanction laws which impact doing business in the country?

Canada's judicial system is considered to be transparent and free from corruption. Canada's anti-corruption legislation is strong and they are even allowed to prosecute companies that are breaking these laws outside of Canada.

The criminal code of Canada criminalizes active and passive bribery, influence peddling, facilitation payments, extortion and abuse of office. The bribery of officials is addressed by the Corruption of Foreign Public Officials Act.

Money laundering is criminalized under the proceeds of crime money laundering and terrorist financing act. The conflict of interest and post-employment code for public office holders requires public officials to disclose their financial assets and regulates conflict of interest. However, certain personal and financial assets are exempt from this. All public employees must adhere to the values and ethics code for the public sector. Further, Canada’s anti-corruption legislation is supplemented by Canadian anti-corruption legislation is supplemented by the Canadian Business Corporations Act which criminalizes accounting practices that require manipulation of a company's accounts. The federal accountability act provides for accountability and transparency in the government and addresses conflict of interest, electoral financing and lobbying. Both public sector employees and private company employees are protected when they are whistle blowers. Canada has ratified the UN convention against corruption and the OECD anti-bribery convention. Canada is also a party to the inter-American convention against corruption.

**Types of transaction:** How may businesses combine?

Businesses may combine when an acquirer obtains control of one or more businesses. For example, the acquisition of shares or net assets, mergers, reverse acquisitions.

A business combination is normally structured either as a takeover bid or as a court approved planned of arrangement. But it can also be done through a reorganization. A takeover bid is where the purchaser offers to acquire outstanding voting or equity securities where the securities subject to that offer combined with shares already owned by the purchaser constitute 20% or more.

A plan of arrangement is a multi-step transaction which might involve an amalgamation, an amendment to the corporation’s articles, a transfer of property, an exchange of securities, and a compromise with creditors. This requires two court appearances and shareholders meeting. It becomes effective once the final documentation is filed with the court registry.
<table>
<thead>
<tr>
<th>Competition Law: How do laws impact competition?</th>
<th>Allegations of competition offenses are investigated by the commissioner of competition. These are brought in front of the competition tribunal which is composed of judges of the federal court of Canada and non-lawyer experts. These have to do with five matters; refusal to deal, price maintenance, exclusive dealing, tied selling, and market restriction.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Employment Relations: Briefly summarize major laws impacting employment and employee relations.</td>
<td>The nature of the business determines whether its relations with its employees are regulated by federal or provincial law. Most fall into provincial law. Some of the ones that fall under federal are: navigation and shipping, railways, interprovincial transport, air transportation, communications, broadcasting and banking. Some major laws impacting employee employer relationships are contracts. Contract sets out particular duties owed to employees and employers such as not harming ones employer during or after employment which includes not discussing trade secrets. Also restrictive covenants can be written into the contract which restricts or limits what an employee can do and. Furthermore, the law holds that if an employee is let go without just cause are entitled to reasonable notice of termination for employment and may recover damages if such notice is not given. Provincial and territorial statues also exist and manage minimum wage rates, method and frequency of paying, statutory holidays, medical leave, etc. There are also statutes dealing with health and safety other things such as harassment and violence. There is also human rights legislation to protect employees, along with payment equity legislation in some provinces.</td>
</tr>
<tr>
<td>Statutes and regulations: What are the main laws and regulations governing business combinations?</td>
<td>In Canada, there is no federal securities regulatory agency. Instead, each province each province and territory establishes their own laws and regulations separately. However, the rules are, for the most part, very similar if not identical. Also, securities regulators have the power to intervene in any transaction that are considered to be contrary to the public interest. In September 2014 the federal government and the provincial governments from British Columbia, Ontario, New Brunswick, Prince Edward Island, Saskatchewan, and the Yukon signed a memorandum of agreement to create a new proposed co-operative capital markets regulatory system. Companies are able to incorporate under Federal Canada Business Corporations Act or one of the provincial or territorial Business Corporations Acts. Extraordinary transactions, such as those used to complete business combinations must generally be approved by a special resolution of the shareholders and usually two thirds of the votes must be cast. Courts have been given broad powers to intervene in transactions where they are viewed to be oppressive, unfairly prejudicial to, or that unfairly disregard the interests of shareholders and other stakeholders. Canada has a number of stock exchanges, the senior equity exchange being the Toronto Stock Exchange. These all may regulate certain aspects of business combinations. For example, The TSX requires a listed acquirer to obtain approval of its shareholders if the acquisition would result in the issuance of more than 25% of the outstanding shares. Further, business combinations may be subject to industry specific regulatory laws and laws of application which include The competition Act and the Investment Canada Act.</td>
</tr>
</tbody>
</table>
| Governing Law: What law typically governs the transaction agreements? | The law that governs a takeover bid is the law of the province or territory where the shareholders of the target issuer reside. The target issuer and the acquirer may enter into a support agreement which would make the transaction a friendly takeover bid. The acquirer can also enter into a lock up agreement with shareholders of the target for the purpose of obtaining their commitments to support the transaction. As these agreements are by nature contractual, there is no specific rule for determining the governing law. It would be the governing law of the jurisdiction in which the target is incorporated.

A plan arrangement is also a contractual matter and so the governing law is the same as above. |
|---|---|
| Filings & Fees: Which government or stock exchange filings are necessary in connection with a business combination? Are there stamp taxes or other government fees payable in connection with a business combination? | There are different forms of business combinations and the type determines the necessary filings. In a formal (non-exempt) takeover bid there are 2 main filings to be made with the applicable securities regulators. The acquirer must file the takeover bid that describes the terms of the offer along with other required disclosure. And the target company must file a director’s circular which is prepared by the board of the target company and includes the targets board’s recommendation concerning the bid. If any changes are made then notices must be filed to note these changes.

In another type of combination, a corporate transaction requiring shareholder approval must file a management information circular. And other supplemental materials must be filed with the applicable securities regulators. The content and timing of the filings must comply with the statutory requirements but are not subject to a review or clearance process. The fees are dependent on the size and structure of the transaction and the federal and provincial jurisdictions involved. If the consideration for a business combination includes the issuance of securities of the acquirer that are listed on the stock exchange, filings will need to be made with the appropriate stock exchange to obtain the necessary listing approvals. The cost will vary depending on the stock exchange and the number of securities issued.

Canada does not have stamped taxes. |
| Information to be Disclosed: What information must be made public in a business combination? Does this depend on the structure used? | Yes, the structure of the business combination does effect the scope of the disclosure. A corporate transaction such as a plan of arrangement requires that the parties agree to the transaction and its material terms before the public announcement by way of a news release of such a transaction. Once the terms have been agreed upon and announced then the target company will prepare a management information circular which is then filed with the governing securities regulator and mailed to shareholders of the target company. This will set out prescribed information in respect to the transaction such as a description of the background to the transaction and the negotiation process that took place between the parties and will include information that is material to the shareholders to allow them to make a reasoned decision to approve and vote in favor or reject the transaction and vote against it.

For a takeover bid a takeover bid circular must be filed with the appropriate securities regulators. It must then be mailed to shareholders of the target company. It must have the following information including:

The terms of the offer;

The acquirers attention in regards to the offer including a second stage |
When a purchaser is in control of 10% or more of a class of voting or equity securities of a public company then that person becomes an insider. Once an individual is an insider then the insider must:

1. Comply with Canada’s early warning system by promptly issuing and filing a news release to announce the holding that he has in the public company, the purpose for which the securities were gathered, and any future intentions to acquire additional securities of the public company. Also, within 2 business days file an early warning report with the Canadian securities regulators.

2. File an insider report on Canada’s system for electronic disclosure by insiders (SEDI) publicly reporting the purchaser’s beneficial ownership of, or control or direction over voting or equity securities over this public company. Under the early warning regime the purchaser must also file further news releases and early warning reports upon the acquisition or disposition of each additional 2% or more of the outstanding class of voting or equity securities of the public company. And the holdings decreasing below 10%, or a change in a material fact of the most recently filed early warning report.

Furthermore, the insider must report on SEDI occasionally regarding any holdings he has in that company. If this company was under a takeover bid then the reporting threshold drops to 5%.

### Disclosure of substantial shareholdings:

What are the disclosure requirements for owners of large shareholdings in a company? Are the requirements affected if the company is a party to a business combination?

When a purchaser is in control of 10% or more of a class of voting or equity securities of a public company then that person becomes an insider. Once an individual is an insider then the insider must:

1. Comply with Canada’s early warning system by promptly issuing and filing a news release to announce the holding that he has in the public company, the purpose for which the securities were gathered, and any future intentions to acquire additional securities of the public company. Also, within 2 business days file an early warning report with the Canadian securities regulators.

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### Duties of directors and controlling shareholders:

What duties do the directors or managers of a company owe to the company’s shareholders, creditors and other stakeholders in connection with a business combination? Do controlling shareholders have similar duties?

Directors owe a fiduciary duty to the corporation. This means that they must honestly and in good faith with the view to the best interests of the corporation. This also means being loyal to the corporation. A director must disclose his or her personal interest in the material contract. refrain on voting on anything that puts him in a conflict of interests and refrain from using corporate property or information for personal benefit.

They also owe a duty of care to the corporation. And this means that the director must exercise the care, diligence, and skill that a relatively prudent individual would do in comparable circumstances. They also owe duties for wages and pensions, tax related duties for employees, and duties arising from environmental legislation. Like directors, officers also owe a fiduciary duty to the corporation, and are generally subject to the same duty of care that is imposed on directors.
### Approval and appraisal rights

What approval rights do shareholders have over business combinations? Do shareholders have appraisal or similar rights in business combinations?

In order to get approval for corporate transactions there needs to be two thirds of the target company's shareholders who also vote for the approval of the transaction. Usually a majority of the minority of unrelated shareholders of the target company is necessary. Once the shareholders have decided whether to tender to the bid they are then required to deliver their shares to the offeror who, following completion of the bid, is able to effect a second stage transaction or statutory squeeze out to facilitate the acquisition by the offeror of those shares not otherwise tendered under the bid. Normally by this stage enough favorable votes have been received to be successful.

Dissenting shareholders generally have dissent and appraisal rights in connection with the shareholder vote undertaken for a corporate transaction and also second in second stage transactions. If the dissenting shareholder contests the fair value of its shares of the target company placed on them by the acquirer, an application can be made to the court to fix a fair value for those shares.

### Hostile transactions

What are the special considerations for unsolicited transactions?

A friendly takeover can happen through a planned arrangement or takeover bid. However, a hostile takeover or unsolicited takeover has to be done through a takeover bid. This allows the hostile bidder to appeal right to the target company's shareholders, avoiding the target companies management and board of directors to agreed terms and conditions with them in advance of the offer.

In May of 2016 new rules came into force instrument 62-104 takeover bids and issuer bids was amended and now includes a 105 day minimum deposit. Subject to reduction upon consent. The possible reduction is down to 35 days, a mandatory minimum of 50%, tender condition and a mandatory 10 day extension to the deposit period on satisfaction of the minimum tender condition.

These new rules allow the target boards an extended period of time to negotiate with the bidder or to search for other potential bidders. The ability for the target board to shorten the bid period will help deter hostile bids for any bidders trying to complete the acquisition quickly. The new rules have also made it hard for the bidders to acquire material equity position without first acquiring a majority interest.

There is also recourse to the courts when disputes arise concerning bids. If, for example, an issuer is subject to a hostile bid, they may challenge such bid on the basis of non-compliance with statutory requirements. A bidder may also seek redress for defensive actions taken by the target board to frustrate a bid which may be a breach of their fiduciary duties.

### Break-up fees – frustration of additional bidders

Which types of break-up and reverse break-up fees are allowed? What are the limitations on a company’s ability to protect deals from third-party bidders?

A break fee is an agreed upon payment that a target company will pay to a potential acquirer in the event that a business combination is not completed. Break fees are included to protect a potential acquirer from the impact of another contemplated bid or to compensate them where the proposed acquisition is not successful. They are not specifically regulated under Canadian corporate securities laws and can be disputed by reference to the director’s fiduciary duties. The break fee is usually between 2 and 5%. The size of the fee is always negotiated and therefore it is effected by the relative bargaining strength of the parties involved and other considerations specific to the transaction.

Reverse break fees are payable by the potential acquirer to the target in the event a transaction is not closed for specified reasons. These are also not regulated and could theoretically also be challenged on the basis of the director’s fiduciary duties, but are not subject to the same potential scrutiny because they may have auction ending implications.
The ICA is Canada’s federal statute of general application governing the acquisition of control of Canadian businesses by non-Canadians. Jurisdiction over investments rests with the Department of Innovation, Science and Economic Development Canada and reviews are carried out by the Investment Review Division (IRD) within this department. An investment governed by the ICA is either notifiable or reviewable depending on the value of assets of the Canadian business being acquired, the identity of the investor, and the structure of the transaction.

Before a reviewable investment may be completed, the appropriate Minister must determine that the investment is likely to be of ‘net benefit to Canada’. The ICA requires the Minister to take the following factors into account, where relevant, in making their determination:

- The effect of the investment on the level and nature of economic activity in Canada, including, without limiting the generality of the foregoing, the effect on employment, on resource processing, on the utilization of parts, components and services produced in Canada and on exports from Canada;
- The degree and significance of (continued) participation by Canadians in the Canadian business (in particular at the director and officer levels) and in any industry or industries in Canada of which the Canadian business forms a part;
- The effect of the investment on productivity, industrial efficiency, technological development, product innovation and product variety in Canada;
- The effect of the investment on competition within any industry or industries in Canada;
- The compatibility of the investment with national industrial, economic and cultural policies, taking into consideration industrial, economic and cultural policy objectives enunciated by the government or legislature of any province likely to be significantly affected by the investment; and
- The contribution of the investment to Canada’s ability to compete in world markets.

The review process often includes negotiating contractual commitments or undertakings that are requested by the IRD to satisfy the Minister that the investment will be of net benefit to Canada. These undertakings usually have a duration of three to five years and may include commitments to maintain jobs and facilities in Canada, to retain Canadian management, to make capital expenditures in Canada, to comply with environmental regulations, to conduct research and development in Canada and to provide Canadian suppliers the fair opportunity to provide goods and services to the Canadian business. Given the politicization of the ICA review process, the investor will want to ensure that the transaction is well understood by all potential stakeholders in government (federal, provincial and local), and relevant civilian groups, whose stakeholders could negatively influence opinion shapers and the public perception of the transaction.

In addition, the ICA contains a national security review mechanism that allows the Canadian government to review, prohibit, or impose conditions on a broad range of direct and indirect investments by non-Canadians on the basis of national security concerns. On December 19, 2016, the federal government released new guidelines on national security reviews (NS Guidelines). The NS Guidelines set out the factors considered by the government when assessing national security risk including, in particular: the effect on Canada’s defense capabilities, transfers of sensitive technology or know-how, critical infrastructure, the enablement of foreign surveillance or espionage, the hindering of law enforcement operations and the potential involvement of illicit
actors, such as terrorists or organized crime syndicates. The NS Guidelines also mention as factors the impact on the supply of critical goods and services to Canadians, the supply of goods and services to the federal government, and the impact of an investment on Canada’s international interests or foreign relationships.

### Conditional offers: What conditions to a tender offer, exchange offer or other form of business combination are allowed? In a cash acquisition, may the financing be conditional?

Generally speaking, there are no restrictions on the type of conditions that may be included in a business combination provided they are not coercive or abusive of security holders. One notable exception is that transactions completed by way of a takeover bid with cash consideration cannot be subject to financing and funds must be readily available to the offeror. Sufficient financing to cover the cash component of a bid must be arranged in advance of the bid being launched such that the purchaser reasonably believes financing is available even if some conditions to actually receiving funds are applicable. However, a business combination completed by way of an amalgamation or plan of arrangement does not carry such a prohibition.

### Financing: If a buyer needs to obtain financing for a transaction, how is this dealt with in the transaction documents? What are the typical obligations of the seller to assist in the buyer’s financing?

Where a business combination involves a financing condition, the transaction agreement typically provides for a covenant of the purchaser that it take all steps necessary to obtain acquisition financing. At the same time, the target company typically covenants to cooperate with the purchaser and the financing sources by: giving access to management, including participation in road shows and due diligence sessions; assisting with the preparation of customary materials for rating agencies, offering and private placement memoranda, prospectuses and similar documents; executing any pledge and security documents; and providing any required financial statements or other information.

Where a financing condition is in place, the target company often has a reverse break fee where it is entitled to a significant payment from the purchaser in the event the financing condition is not satisfied prior to closing and the business combination is unable to be completed as a result.

### Minority squeeze-out: May minority stockholders be squeezed out? If so, what steps must be taken and what is the time frame for the process?

In the context of a takeover bid, most Canadian corporate statutes provide that where a takeover bid has been accepted by shareholders (other than the purchaser and its affiliates) representing 90 per cent or more of outstanding shares of a class, the remaining shares can be acquired or squeezed-out at the same price by operation of law, subject to rights of dissent and appraisal. Upon acquisition of 90 per cent or more of the outstanding shares of a target, the purchaser may send a notice to remaining shareholders that it is exercising its rights to acquire the remaining shares. Each shareholder has the right to dissent in respect of this process and apply to a court to establish a fair market value for the shares. The exercise of dissent rights does not prevent the purchaser from acquiring the shares of the dissenting shareholder, however, the purchaser inherits a court process that is completed following the acquisition, where a court hearing is held to determine the fair value of the dissenting shareholder’s shares. Depending on the outcome of this court process, the purchaser will be required to pay the former shareholder the fair value set by the court, which can be higher or lower than the bid price. The court process requires the former shareholder and the purchaser to adduce evidence as to the fair value of the shares. In some circumstances the fair value process is settled as between the former shareholder and the purchaser prior to the conclusion of the court process.

Alternatively, a second step acquisition transaction is available to purchasers who do not reach 90 per cent ownership but manage to acquire two-thirds of the
target’s outstanding shares (or 75 per cent pursuant to some corporate statutes) and any majority of the minority required. In this case, the purchaser can propose an amalgamation, arrangement, share consolidation or other transaction in order to acquire the remaining shares. In all cases the shareholder vote required will be carried by the purchaser’s holdings. A minority shareholder often has similar rights of dissent an appraisal in the context of such a second step acquisition transaction.

Cross-border transactions: How are cross-border transactions structured? Do specific laws and regulations apply to cross-border transactions?

A Canadian plan of arrangement is often the preferred acquisition method where shares will be issued as consideration for the Canadian target’s shares. In respect of cross-border acquisitions involving Canadian companies with shareholders resident in the United States, section 3(a)(10) of the US Securities Act of 1933 (1933 Act) provides an exemption from the registration requirement for the issuance of securities if the issuance has been approved by a court of competent jurisdiction after a hearing on the fairness of the terms and conditions of issuance, of which all of the target’s security holders that may be arranged receive notice and have an opportunity to attend and be heard. The US Securities and Exchange Commission (SEC) has recognized that Canadian plans of arrangement satisfy the requirements of section 3(a) (10). As a result, a plan of arrangement is often used by purchasers if securities are being issued to any shareholders resident in the United States, since doing so permits the purchaser to complete the acquisition without filing a registration statement in the US.

In addition, Canadian foreign private issuers generally are exempt from the SEC proxy rules. Therefore, the SEC proxy rules should also not apply.

Exchangeable share transactions also may be used in cross-border acquisitions involving a Canadian target company and a foreign purchaser using share consideration. The purpose of this structure is to provide Canadian resident shareholders of the target company with a tax-deferred rollover on the exchange of their shares of the Canadian target company for exchangeable shares of a Canadian acquisition company. A roll-over is not available if the exchange is made directly for shares of the foreign parent, which may result in the selling shareholder realizing a capital gain on the disposition. The shares of the Canadian acquisition company received by target shareholders are exchangeable at the holder’s option for common shares of the foreign public parent. This exchangeable share structure will normally defer the taxation of the capital gain until the shareholder sells the exchangeable shares or exercises the exchange right for the publicly traded shares of the foreign parent company.

The Canada-US multi-jurisdictional disclosure system (MJDS) provides that an eligible takeover bid made for a Canadian target company in compliance with Canadian requirements will generally also comply with US federal requirements provided that certain prerequisites are met. In particular, the MJDS provides that a takeover bid that is being made for a target company that is: (I) organized under the laws of Canada or any Canadian province or territory; (ii) a foreign private issuer under applicable US rules; and (iii) not an investment company registered or required to be registered under the US Investment Company Act of 1940, may also be made in the United States to US security holders in accordance with Canadian takeover bid requirements, provided that US holders hold less than 40 per cent of the securities of the class subject to the bid. Applicable MJDS rules and forms provide for the filing of Canadian takeover bid materials, wrapped in the appropriate MJDS schedule, in order to meet US tender offer filing requirements. If the consideration offered under the takeover bid includes shares, the
purchaser must also comply with the registration requirements of the 1933 Act. All bids must be extended to each holder of the class of securities in the United States and Canada upon terms and conditions not less favorable than those offered to any other holder of the same class of securities, and the transaction itself must be subject to (and not exempt from) the formal Canadian takeover bid rules.

With regard to specific laws and regulations relating to cross-border transactions, see also the description of the ICA in question 11.

A Canadian plan of arrangement is often the preferred acquisition method where shares will be issued as consideration for the Canadian target’s shares. In respect of cross-border acquisitions involving Canadian companies with shareholders resident in the United States, section 3(a)(10) of the US Securities Act of 1933 (1933 Act) provides an exemption from the registration requirement for the issuance of securities if the issuance has been approved by a court of competent jurisdiction after a hearing on the fairness of the terms and conditions of issuance, of which all of the target’s security holders that may be arranged receive notice and have an opportunity to attend and be heard. The US Securities and Exchange Commission (SEC) has recognized that Canadian plans of arrangement satisfy the requirements of section 3(a) (10). As a result, a plan of arrangement is often used by purchasers if securities are being issued to any shareholders resident in the United States, since doing so permits the purchaser to complete the acquisition without filing a registration statement in the US.

In addition, Canadian foreign private issuers generally are exempt from the SEC proxy rules. Therefore, the SEC proxy rules should also not apply.

Exchangeable share transactions also may be used in cross-border acquisitions involving a Canadian target company and a foreign purchaser using share consideration. The purpose of this structure is to provide Canadian resident shareholders of the target company with a tax-deferred rollover on the exchange of their shares of the Canadian target company for exchangeable shares of a Canadian acquisition company. A roll-over is not available if the exchange is made directly for shares of the foreign parent, which may result in the selling shareholder realizing a capital gain on the disposition. The shares of the Canadian acquisition company received by target shareholders are exchangeable at the holder’s option for common shares of the foreign public parent. This exchangeable share structure will normally defer the taxation of the capital gain until the shareholder sells the exchangeable shares or exercises the exchange right for the publicly traded shares of the foreign parent company.

The Canada-US multi-jurisdictional disclosure system (MJDS) provides that an eligible takeover bid made for a Canadian target company in compliance with Canadian requirements will generally also comply with US federal requirements provided that certain prerequisites are met. In particular, the MJDS provides that a takeover bid that is being made for a target company that is: (I) organized under the laws of Canada or any Canadian province or territory; (ii) a foreign private issuer under applicable US rules; and (iii) not an investment company registered or required to be registered under the US Investment Company Act of 1940, may also be made in the United States to US security holders in accordance with applicable MJDS rules and forms provide for the filing of Canadian takeover bid materials, wrapped in the appropriate MJDS schedule, in order to meet US tender offer filing require-
If the consideration offered under the takeover bid includes shares, the purchaser must also comply with the registration requirements of the 1933 Act. All bids must be extended to each holder of the class of securities in the United States and Canada upon terms and conditions not less favorable than those offered to any other holder of the same class of securities, and the transaction itself must be subject to (and not exempt from) the formal Canadian takeover bid rules.

With regard to specific laws and regulations relating to cross-border transactions.

### Waiting or notification periods

A takeover bid must remain open for a minimum of 105 days, subject to the ability of the target company consenting to a shorter bid period of not less than 35 days. Furthermore, the bid may be open for longer and may be extended by the purchaser. Thus, hostile takeover bids must comply with a 105-day bid period. On successful completion of the bid, if the purchaser is seeking to squeeze out non-tendering shareholders, it can do so pursuant to the procedures described in a previous question.

An amalgamation, plan of arrangement or other transaction structure that requires the approval of the target shareholder at a shareholders’ meeting typically requires 50-60 days in order to comply with applicable laws relating to notice periods for shareholder meetings.

### Sector-specific rules

Certain industries, particularly those relating to national security or those that are classified as ‘cultural businesses’ are subject to additional regulations. In addition, certain legislation applicable to certain industries may specify a minimum of Canadian-resident ownership. For example, the requirements of the Canada Transportation Act that currently at least 75 per cent of the voting interests of Canadian airlines must be held by Canadians and the requirements of the Telecommunications Act (Canada) that at least 80 per cent of the voting interests of certain holders of radio authorizations and broadcasting licenses be Canadians.

### Tax issues

Many tax issues are raised in the context of a business combination, including: (i) capital gains taxes for target shareholders and the ability to defer the payment of such taxes; (ii) exchangeable shares and the tax benefits arising from their use; (iii) the impact of withholding taxes on non-Canadian shareholders and any applicable obligations of purchasers in respect thereof; (iv) the treatment of stock-based incentive securities, including stock options; and (v) issues arising from the acquisition of control of a Canadian company (including the loss of tax carry-forwards).

### Labor and employee benefits

The employment relationship in Canada is governed by obligations arising from three sources: statutory law, contract provisions and common law (or Civil Code in Quebec), all of which are relevant to employee transfer issues in acquisitions. In terms of statutory obligations, most employers will be provincially regulated with respect to employment matters; therefore, such employers must comply with the provincial laws in each province in which their employees work, as opposed to a single federal law that applies to all operations across the country.

In terms of contractual obligations, it is best practice in Canada for employers to use written contracts to document their relationship with each of their employees. Written contracts can rebut certain terms normally implied at common law but cannot contract out of, or avoid, minimum statutory obligations.
### Restructuring, bankruptcy or receivership

What are the special considerations for business combinations involving a target company that is in bankruptcy or receivership or engaged in a similar restructuring?

The Companies' Creditors Arrangement Act (CCAA) and the Bankruptcy and Insolvency Act (BIA) are the statutes that govern the restructuring of insolvent issuers. The CCAA generally offers greater flexibility for reorganizations and restructurings. CCAA proceedings are court supervised debtor-in-possession proceedings, with a goal of restructuring the debtor entities. Under the BIA, there are two common forms of court-supervised proceedings, being receiverships and bankruptcies. Receiverships and bankruptcies are not restructuring proceedings, but are designed to allow for the liquidation of a debtor’s assets. In all of these proceedings, out of the ordinary course sales of all the debtor’s assets are permissible. Typically, the purchaser of assets in such proceedings will receive the benefit of a Court order, approving the transaction and vesting title in the assets in the purchaser, free and clear of all existing creditor claims against the debtor entity. However, purchasers in such scenarios will not be able to rely on receiving meaningful representations, warranties or indemnities from the vendor (the debtor company, a receiver or a trustee in bankruptcy).

Usually, to approve such a transaction, the Court will require evidence that the purchaser is offering fair value. This evidence is typically provided by way of appraisals, valuations or an actual marketing process having been conducted for the assets.

In Canada, creditors’ claims take priority to the claims of shareholders. Therefore, if purchasers wish to acquire the shares rather than the assets of an insolvent debtor, it will be necessary either to pay all the insolvent debtor’s creditors in full, or to compromise their claims for less than the full amount of those claims. In the latter (compromise) scenario, the creditors must be given the opportunity to vote to approve the compromise of their claims.

### Anti-corruption and sanctions

What are the anti-corruption, anti-bribery and economic sanctions considerations in connection with business combinations?

Canada is a signatory to the 1997 OECD Convention on Combatting Bribery of Foreign Public Officials in International Business Transaction (OECD Anti-Bribery Convention). The Corruption of Foreign Public Officials Act (Canada) (CFPOA) was adopted to implement the OECD Anti-Bribery Convention. Pursuant to the CFPOA, bribery of a foreign public official is a criminal offence and occurs where a person, in order to obtain or retain an advantage in the course of business, directly or indirectly gives, offers or agrees to give or offer a loan, reward, advantage or benefit of any kind to a foreign public official or to any person for the benefit of a foreign public official as consideration for an act or omission by the official in connection with the performance of the official's duties or functions; or to induce the official to use his or her position to influence any acts or decisions of the foreign state or public international organization for which the official performs duties or functions. An offer alone can trigger liability for the CFPOA's bribery offence.

The CFPOA asserts jurisdiction over all Canadian citizens and corporations regardless of where the alleged offence is committed. Amendments to the CFPOA in 2013 include the elimination, on a date to be determined, of the current exception for facilitation payments, which permits payments made to expedite routine acts. In the case of an individual, section 3(2) provides that the maximum penalty...
is imprisonment for a term of up to five years and in the case of a corporation there is no maximum fine. Penalties and sanctions arising from the violation of the CFPOA are significant and the Canadian federal government is aggressively enforcing the CFPOA. For example, in 2011 a C$9.5 million fine was issued and in 2013 a C$10.35 million fine was issued.

In relation to private corporate relationships, section 426 of the Criminal Code addresses 'secret commissions' and prohibits providing any reward, advantage or benefit of any kind as consideration for doing or not doing, or for having done or not done, any act relating to the affairs or business of the agent’s principal. Payment of a secret commission is an indictable offence and liable to imprisonment for a term not exceeding five years.