

TIMOTHY M. BANKS

CORPORATE
ACQUISITIONS
AND MERGERS IN
CANADA

SECOND EDITION



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Corporate Acquisitions and Mergers in Canada

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Timothy M. Banks
Updated with the assistance of Vanja Ginic

Dentons Canada LLP

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Corporate Acquisitions and Mergers in Canada

TIMOTHY M. BANKS

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Currency & Notice

Mergers & Acquisitions in Canada reflects Canadian laws as of 1 May 2016, without regard to amendments not yet in force. Although the author covers numerous legal issues that may arise in the course of mergers and acquisitions, this publication provides general information only, is not a complete statement of applicable law and considerations in embarking on Canadian mergers and acquisitions, and is not intended and does not provide legal advice to the reader. Readers should consult with lawyers qualified in Canadian law with respect to particular issues and specific transactions and should not rely upon this

publication. Subject to appropriately conducted conflict checks and formal retainer agreements, Dentons would be pleased to provide assistance to readers with respect to mergers and acquisition transactions or any issue discussed in this publication.

A Note on Conventions

For ease of exposition, the author has adopted certain conventions.

- Unless otherwise noted, the discussion is focused on the *Canada Business Corporations Act* (CBCA), which is the federal business incorporation statute and representative of the main form of business corporation statute in Canada.
- The discussion of securities laws and regulations governing offering corporations is focused on the Province of Ontario. Most offering corporations in Canada will be registered with the Ontario Securities Commission and subject to the *Securities Act* (Ontario).
- Unless otherwise noted, references to 'provinces' include the three territories of Canada.

Monetary figures are provided in Canadian currency.

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LOCAL, ECONOMIC AND CULTURAL ASPECTS

[01] This section describes the structure of the Canadian legal environment in which mergers and acquisitions take place.

Profile

[02] Canada is located in the northern part of the continent of North America. It is the second largest country by land mass and is rich in natural resources. Canada is bounded by three oceans: the Arctic Ocean in the north, the Pacific Ocean in the west and the Atlantic Ocean in the east. Canada's southern border is shared with the US and follows the forty-ninth parallel for much of the west and mid-west. Canada's border with the US constitutes the longest land border between two countries. Canada's largest trading partners are the United States, China and the EU (with an emphasis on the United Kingdom).

[03] Canada's total population is approximately 36 million. In recent years, Canada's population growth has been the highest among the G-8 countries. The increase in Canada's population is driven by immigration. Nevertheless, in stark contrast to its geographical size, Canada remains the least populous country in the G-8. To put the contrast between geographical size and population in context, Canada's total population in a country of 9.9 million square kilometres is less than the city of Tokyo, Japan, and has historically been only one-tenth of the total population of the US. According to the last national census, conducted in May 2011, Canada's labour force consisted of 17 990 080 participants.

[04] Canada's two official languages are French and English. The official currency is the Canadian dollar.

Government and Political System

[05] Canada is a federal state in which executive and legislative functions are divided between a national or federal Parliament and ten provincial legislatures. In addition, Canada contains three northern territories, which are creatures of federal statute but have delegated legislative authority similar to provinces. In addition, municipal governments exercise delegated legislative authority by provincial statute. In some cases, Canada's aboriginal groups have limited self-governing rights as a result of treaties or other agreements.

[06] The subject matters over which Canada's federal Parliament and provincial legislatures have authority are generally intended to be mutually exclusive. Parliament has jurisdiction over international trade, foreign investment, banking, interprovincial trade, harbours and aeronautics, interprovincial railways, telecommunications, intellectual property, citizenship and immigration, and criminal law (among other things). Provincial legislatures have jurisdiction over

natural resources, land use, property rights, and civil rights (such as contracts, torts and most other types of private law).

[07] Although the powers of Parliament and the legislatures are intended to be mutually exclusive, there is significant overlap because these entities may regulate different aspects of a commercial activity. If there is an operational conflict between a federal law and a provincial law, the federal law will govern to the extent of the conflict.

[08] Canada is a politically stable country that is generally welcoming of foreign investment, although there are certain industries in which foreign ownership may be limited. Canada is also a member of the World Trade Organization (WTO) and a party to the North American Free Trade Agreement (NAFTA), as well as other bilateral Foreign Investment Promotion and Protection Agreements. Canada recently signed the Trans-Pacific Partnership (TPP) agreement and ratified the ICSID Convention on the Settlement of Investment Disputes. Canada is a member of the G8 and G20 nations is well-integrated into the global financial system.

Legal System

[09] In all provinces other than Québec, private law (property and civil rights) is based on the English common law tradition. In Québec, private law is based on the French civil law tradition. Public law, in all provinces, is based on the English common law tradition.

[10] Federally, Canada is officially bilingual. French is the sole official language in Québec. New Brunswick and the Territories are officially bilingual. In addition, the Territories officially recognize certain aboriginal languages. In other jurisdictions, English is the predominant language.

[11] Parliament, the provincial legislatures and the territorial legislatures each have the power to incorporate business corporations. Federal corporations have the right to carry on business throughout Canada. Although the provincial power of incorporation is constitutionally limited to corporations having 'provincial objects', this restriction has been narrowly construed. Provincial business corporation statutes permit a corporation to carry on business outside of the province subject to the laws of the other jurisdiction. Typically, a company incorporated in one province must extra-provincially register in the other province in order to carry-on business. A similar rule applies to foreign corporations seeking to carry on business in a province.

[12] The internal governance of a corporation is generally a matter that is regulated by the legislation under which the corporation was incorporated. Matters relating to the governance of a provincial or territorial business corporation will be brought before the courts of the province or territory of incorporation. Matters relating to the governance of a federal business corporation may be brought before any provincial or territorial superior court.

[13] Parliament and provincial legislatures have the power to regulate corporations engaged in activities that otherwise fall within the jurisdiction of those legislative bodies. Canada's public capital markets are regulated provincially, with significant cooperation and coordination between provincial regulators. Although there has been ongoing discussion of the creation of a national securities regulator, the Supreme Court of Canada has concluded that the day-to-day regulation of all aspects of contracts for securities would go beyond the power of Canada's federal Parliament, although it would be possible for Parliament to regulate matters of genuine national importance and scope such as managing systemic risk.

[14] The Canadian *Charter of Rights and Freedoms* (the 'Charter') is part of Canada's constitution. The Charter imposes limitations on Parliament and the legislatures and administrative bodies created under the legislative authority of Parliament and the legislatures. The Charter guarantees certain fundamental rights and freedoms for all persons in Canada as well as guaranteeing certain aboriginal rights, which will be discussed in subsequent sections.

[15] Corporations may obtain the protection of the Charter in certain areas. For example, a corporation may assert that a law is unlawful if it would infringe on the rights of a natural person. Importantly, corporations may rely on the Charter in respect of unreasonable searches and seizures by governmental authorities.

[16] The independence of the judiciary in Canada facilitates the effective enforcement of Canadian laws in the courts. Contractual and other obligations are enforced by commencing judicial proceedings in a provincial superior court of competent jurisdiction. Generally, private companies may enforce their contractual agreements against governmental agencies or Ministries of the federal, provincial or territorial governments (i.e., the Crown or Crown agents) through the courts. No permission of the government is required; however, in many cases advance notice must be given to the government before commencing a proceeding. When contracting with the Crown or Crown agents, organizations should be mindful that statutes of general application may not apply to the Crown or Crown agents without an express indication to that effect in the statute.

[17] Public companies in Canada are subject to continuous disclosure requirements. As a result, material information relating to potential public company targets may be found through public resources. The most significant resource for locating information a public company is through the System for Electronic Document Analysis and Retrieval (SEDAR) filing system maintained by the Canadian Securities Administrators (CSA). Documents that are required to be filed with securities regulators in Canada must be posted to SEDAR. These include comprehensive annual information forms (AIFs), quarterly and annual financial statements and management discussion and analysis, as well as press releases regarding material changes. Private companies have no obligation to disclose publicly information about their financial and business affairs. It is very uncommon for them to do so. Nevertheless, research and consultancy firms such as KPMG LLP and others are able to assist clients in identifying and researching potential acquisition targets.

Current Economic Aspects

[18] Canada was not severely affected by the last global recession. High commodity demand and buoyant commodity prices fuelled significant GDP growth in Canada and M&A activity. Although current declines in commodity pricing have impacted Canada's oil and gas industry, Canada's overall economic growth continues to be comparable to its peers. M&A activity remains strong. Dentons recently acted for Shaw Communications in its CAD 1.6 bn acquisition of WIND Mobile (a wireless services provider).

[19] In addition, Canada has a friendly environment in which to restructure distressed businesses. The federal *Companies' Creditors Arrangement Act* ('CCAA') provides a flexible legislative structure for companies to restructure their arrangements with creditors and sell non-core assets under protection and supervision of the court. The CCAA is available to companies that are insolvent (on a balance sheet test or otherwise unable to pay their creditors as their debts become due) and who have liabilities in excess of CAD 5 m. With weaker commodity prices, there have been numerous filings of companies in Canada. In some cases, companies may liquidate through proceedings conducted under this legislation. Recent examples of the use of this legislation include the restructuring of forest products giant Abitibi-Bowater and Canadian-based Nortel. The Office of the Superintendent of Bankruptcy Canada maintains an online list of all companies granted protection under the CCAA. The list is updated within two business days of an order granting protection.

[20] Unemployment rates have decreased in recent years while the labour market has been comparatively stable. The underlying trends for Canada's labour market include an aging population, reliance on immigration and temporary foreign workers and skills shortages in certain sectors. Canadian provinces and territories have legislation that regulates the minimum wage. Most provinces have set a minimum wage that exceeds CAD 10.

Main Industries

[21] Canada has abundant natural resources. Canada has one of the largest oil reserves in the world. The vast majority of these reserves are located in Canada's oil sands in the northern area of the Province of Alberta, and, to a lesser extent, in the adjacent province of Saskatchewan. The oil sands take their name from the fact that the crude oil deposit is suspended in a mixture of sand, clay and water. Most of the reserves consist of bitumen, which is a heavy crude oil. The bitumen cannot be shipped by pipeline without being diluted with other hydrocarbons or by 'upgrading' the bitumen into lighter crude. Recently, the National Energy Board approved a Kinder Morgan Trans Mountain pipeline from Alberta to coastal British Columbia. This pipeline would bring Alberta oil to the Pacific coast. The National Energy Board is an independent tribunal that regulates, among other things, interprovincial pipelines. The federal government must still approve the pipeline and Kinder

Morgan must fulfil numerous conditions. The National Energy Board is also considering a proposal by TransCanada for an Energy East pipeline that would link the Alberta oil sands with the Atlantic coast. At present, the majority of Canada's oil sands production is exported to the US, frequently by rail.

[22] Canada's oil sands are subject to a number of environmental controls. The majority of oil sands lie too deep to be mined. Instead, these reserves are recovered by drilling wells and then using steam to liquefy the bitumen, which is then pumped to the surface. There are a number of technologies but these extraction techniques use a significant amount of water. There are environmental limits on the amount of water than may be taken from the local Athabasca River and production water must be transferred to tailings ponds and reused. Companies are also required to reclaim all land after development so that the land is returned to boreal forest. The industry has been working to reduce Canada's greenhouse gas emissions per barrel of oil produced.

[23] Canada also has abundant natural gas resources across the country. Currently, much of the conventional natural gas production is located in the provinces of British Columbia, Alberta and Saskatchewan and offshore in the Maritimes on the east coast of Canada. Canada has become one of the top five largest producers of natural gas in the world. Canada has an extensive natural gas pipeline system, including distribution pipes directly to homes and businesses. Some estimates are that nearly 420 million cubic metres of gas move through Canadian pipelines each day. Because Canada's natural gas frequently contains high levels of hydrogen sulphide (sour gas), Canada has become a leader in the operation of sour gas facilities.

[24] Canada estimates that it has approximately 397 million hectares of wooded land representing 9% of the world's forests and 42% of the world's certified forested area. Canada is among the largest forest products exporter. The forestry industry is concentrated principally in British Columbia, Quebec and Ontario. Most of Canada's forested land is publicly owned Crown land under federal, provincial or territorial jurisdiction and harvested under forest or timber licences.

[25] Canada also has one of the most diverse and productive fisheries in the world. Canada ranks among the top fish and seafood exporters, with the majority of exports destined for the US. Canada's fishery is primarily regulated by the Department of Fisheries and Oceans Canada to ensure the sustainability of the fishery. The Canadian Food Inspection Agency provides export certification.

[26] It should be noted that some of these industries are subject to restrictions on foreign ownership. For more information on such restrictions, please see the section on 'Restricted Sectors'.

[27] Although resource rich, Canada has made significant private sector and public sector investments in the technology sector, including information technology, biotechnology and clean technology businesses. Canada continues to have a vibrant technology sector. E-commerce company Shopify led the field with a remarkable initial public offering (IPO) in 2015 that valued the company at more than CAD 1.2 bn.

[28] Canada has extensive transportation industries in Canada including, rail, aerospace and maritime shipping. Canada has two major transcontinental freight railways owned and operated by Canadian National Railway and Canadian Pacific Railway. The Canadian aerospace industry is a significant part of the Canadian economy and includes research and development, manufacturing and export of aircrafts, engines and components. Canada has numerous international airports through which Canadian goods and services are shipped and which transport passengers within Canada and to major cities around the world. Canada has several major ports in Canada, including in Vancouver (British Columbia), Montréal (Québec) and Halifax (Nova Scotia), with Canadian ports handling more than 300 million tonnes of cargo annually.

Cultural Aspects

[29] Although Canada has a relatively small population, it is a highly urbanized country. Nearly one in three Canadians lives in one of three cities: Toronto (Ontario), Montréal (Québec) and Vancouver (British Columbia). Other populous cities include Calgary (Alberta), Mississauga (Ontario), Surrey (British Columbia), Laval (Québec), Longueuil (Québec), and Burnaby (British Columbia). Of those who live outside of Canada's major metropolises, the majority live in remote regions. Canada's central east provinces of Ontario and Québec have historically been the most populous (and remain so) while metropolitan areas in western Canada have grown beyond the national average in recent years.

[30] Canadians are stereotypically considered to be 'polite' and humble. This masks a real and strong sense of nationalism. It is a complex form of nationalism, however, because of the ethnic diversity of its population and its long and rich history of immigration.

[31] Federally, Canada has two official languages – English and French. French is the official language of the Province of Québec. New Brunswick is officially bilingual. English is the predominant language outside of Quebec and New Brunswick. However, there are significant francophone communities in Ontario, Alberta and Manitoba. A number of aboriginal languages are official languages in some of Canada's northern territories. Canada's policy of celebrating and supporting multiculturalism has contributed to the use of a number of other language groups in Canada, particularly in metropolitan areas. Among these are Cantonese, Mandarin, Punjabi, Spanish, Italian, German and Arabic.

[32] Canada has participated in the Organisation for Economic Co-operation and Development (OECD) Program for International Student Assessment, which examines the ability of 15 year-olds to extrapolate and apply knowledge in reading, mathematics and science. The 2012 data set placed Canada fourth in reading performance, fifth in science performance and sixth in mathematics performance.

[33] Business etiquette in Canada involves direct communication and respecting everyone's opinion (regardless of rank or status). Business hours are generally