

SIGNING, CLOSING AND OPINIONS: CANADA: INTERNATIONAL ACQUISITIONS

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

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

At signing, the documents commonly executed are:

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

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

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

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

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

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

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

4. Who normally attends signing and closing meetings?

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

18. Are digital signatures admitted as evidence of execution?

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

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

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

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

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

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

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

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

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

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

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

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

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

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Languages.

English

Professional associations/memberships.

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

Publications.

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

Professional qualifications.

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

Areas of practice.

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

Non-professional qualifications.

Economics at Queen's University, 1974-76

Recent transactions.

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