



Association des Conseillers juridiques
d'entreprise-Section du Québec

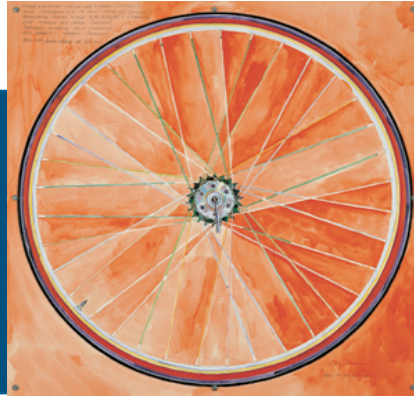
Association of Corporate Counsel
Quebec Chapter

C O N F É R E N C E

Transactions transfrontalières – Canada–États-Unis

Cross-border Transactions – Canada and the US

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Avoiding Surprises in M&A Transactions

Association of Corporate Counsel Meeting • Montreal
Jeff Barnes
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5 Potential Legal Surprises (especially cross border)

- **Issues that may surprise you in cross border M&A**
- **May arise because of tunnel vision by your advisors (and your board)**

5 Potential Legal Surprises (especially cross border)

M&A transactions may require management of legal issues in multiple jurisdictions

Identify the material jurisdictions

- **If a buyer or seller, what consents are needed**
- **If a buyer, are there rules affecting the bidding technique**

Someone has to identify as his or her responsibility

- establishing base case
- keeping it up to date

Will see “false claims” as defence and/or leverage

- “you need our consent”

5 Potential Legal Surprises (especially cross border)

Employment Law can vary significantly across jurisdictions

- **impacts significantly on post-merger synergies**
- **can impact enough to make valuations different**
- **Canada/US expectations different**
- **part of general counsel's role – think about integration**
 - **company resources**
- **should have target plans in place before process begins**

5 Potential Legal Surprises (especially cross border)

Due diligence materials available will vary

- **as a seller, is it relevant to your operations**
 - **controlling the scope of due diligence**
- **as a buyer, may have to design special process**
 - **Foreign Corrupt Practices requirements**
 - **ERISA representations are more detailed**
- **not every question can be answered**

5 Potential Legal Surprises (especially cross border)

Translation

- sometimes an issue, depending on target issuer and shareholder location
- may be mandatory with Canadian targets
 - may be considerable background information
 - consider use of non-law firm translation services

5 Potential Legal Surprises (especially cross border)

Board approval procedures

- tendency to broad-brush approval and delegate to management
- inconsistencies with MD&A and strategic planning
- proper consideration of risks
 - specific deal risks and market risks
- consideration of post-acquisition planning

5 issues to watch with outside M&A advisors

Who is ultimately responsible

- overlaps and cracks where there are multiple counsel and multiple advisors
- best to preplan allocation and combination of resources and delivery of information
- key issue for client is business issues for its overall operation – allocation of legal issues may go in another direction than lawyers expect

5 issues to watch with outside M&A advisors

Defining success

- for M&A advisers, a successful deal is a closed deal
 - tend to walk away from aftermath
- for client, a successful deal is a closed deal on good terms
- also includes a successful transition
 - get adviser work product in a useful form
 - consider seconding intermediate internal staff to working group

5 issues to watch with outside M&A advisors

Familiarity traps

- **advisers will tend to try to cut deals to fit their recent experience**
- **advisers will gloss over interjurisdictional differences and differences in circumstances**

5 issues to watch with outside M&A advisors

Interdisciplinary spillover

- lawyers play investment banker and vice versa
- on billing side, lawyers experience investment banker envy (maybe not right now)

5 issues to watch with outside M&A advisors

Adviser coverage in an extended deal

- in busy markets, senior coverage will tend to migrate away
 - some sense to it, but will be driven by immediacy of demand
- overall coverage for hours based fee earners may be too high in slower periods