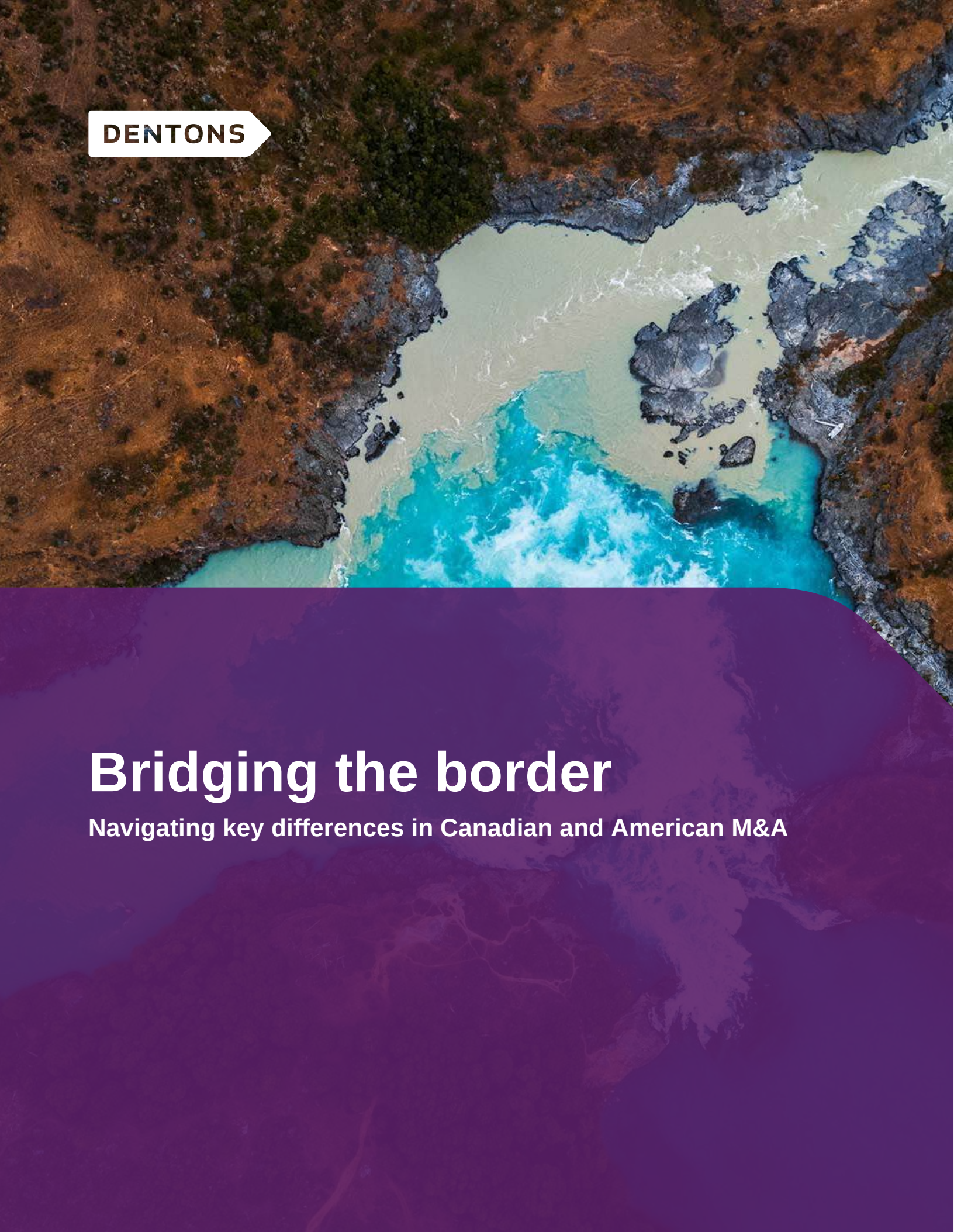
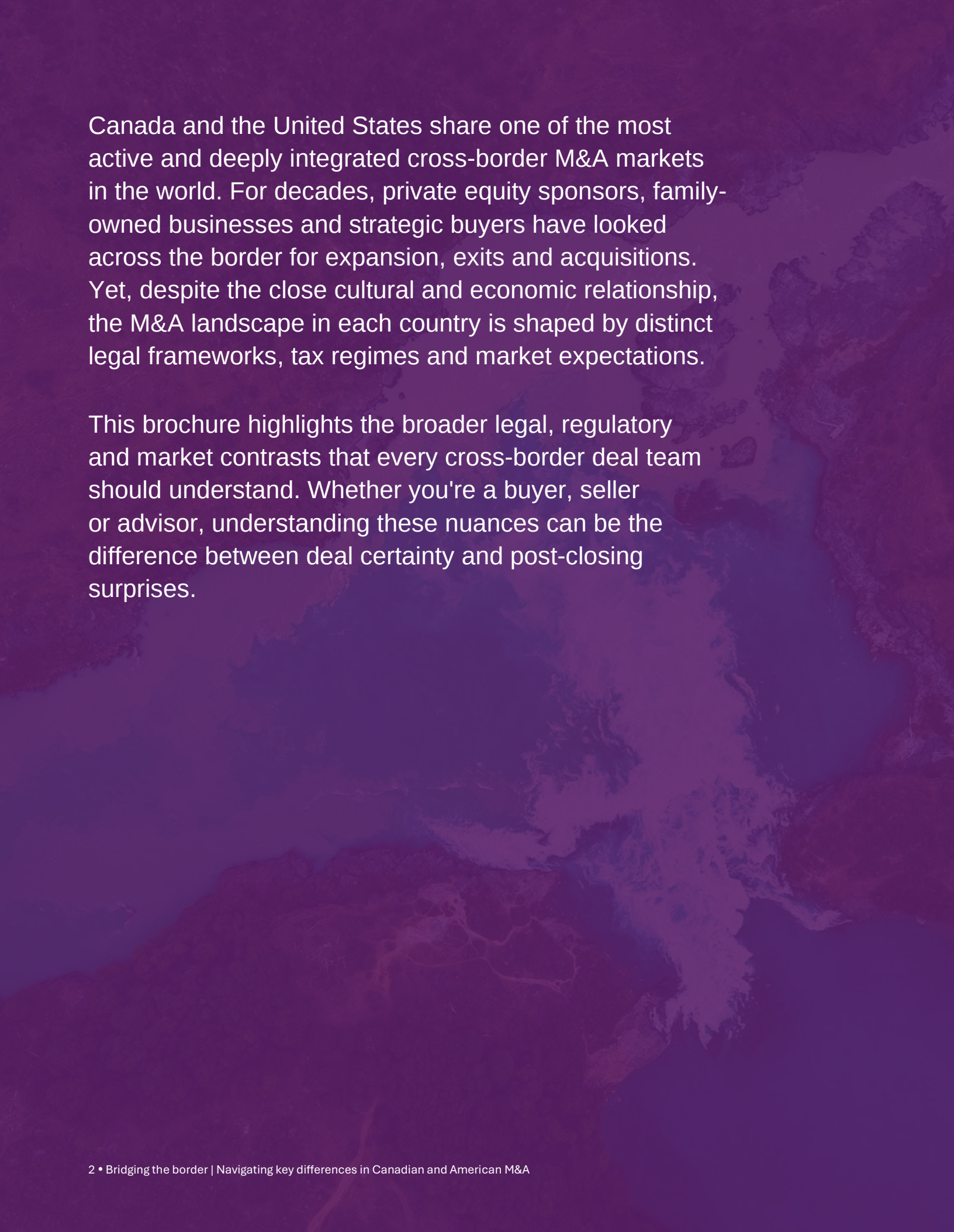




DENTONS

Bridging the border

Navigating key differences in Canadian and American M&A



Canada and the United States share one of the most active and deeply integrated cross-border M&A markets in the world. For decades, private equity sponsors, family-owned businesses and strategic buyers have looked across the border for expansion, exits and acquisitions. Yet, despite the close cultural and economic relationship, the M&A landscape in each country is shaped by distinct legal frameworks, tax regimes and market expectations.

This brochure highlights the broader legal, regulatory and market contrasts that every cross-border deal team should understand. Whether you're a buyer, seller or advisor, understanding these nuances can be the difference between deal certainty and post-closing surprises.

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Structuring the deal

One objective, two playbooks

At first glance, private M&A deals in Canada and the US use the same building blocks: you're either buying the shares of a company or cherry-picking its assets. But once you get into the deal room, the strategic assumptions behind those structures will start to diverge depending on the jurisdiction you are in.

In the US, buyers – particularly private equity sponsors – are more accustomed to structuring acquisitions as “asset sales” from a tax perspective. This approach allows buyers to take a “step-up” in the basis of the purchased assets and reduce their post-closing tax liabilities. This structure does impose additional capital gains tax liability on sellers, as compared to an equity sale. However, the tax benefit enjoyed by buyers frequently outweighs the tax detriment to sellers, and the parties can easily compensate sellers for their incremental tax burden, either by increasing the purchase price or by including an explicit tax true-up provision in the acquisition agreement. US buyers typically prefer to structure these “asset sale” transactions as true asset sales, with the buyer or a newly formed subsidiary acquiring all or substantially all of an existing business entity's assets. This has the added benefit of allowing buyers to exclude unwanted assets and to assume only those liabilities of the sellers' business that are explicitly bargained for in the acquisition agreement. But US law also permits buyers to treat many equity sales as asset sales (from a tax perspective), assuming that the parties can meet certain criteria and agree to make the relevant tax election. This approach is most commonly employed when the target business has material assets that cannot be assigned without the consent of third parties (e.g. important customer or supplier contracts or licenses granted by regulatory authorities).

In Canada, the story plays out differently. Most closely held businesses are incorporated as Canadian-controlled private corporations. Individual shareholders may qualify for the Lifetime Capital Gains Exemption on the sale of qualifying shares, which can shelter capital gains (currently up to CA\$1,016,836) from tax. This makes share deals a central part of seller economics. Asking a Canadian founder to do an asset deal often means asking them to leave significant after-tax dollars on the table. Even when a buyer prefers asset sales for liability reasons, a well-advised Canadian seller will likely push back – or demand a purchase price gross-up to account for the tax hit.

In addition, asset sales may have GST/HST implications, and in some provinces like Ontario and British Columbia, trigger land transfer tax on real estate assets.

But tax isn't the only hurdle. Asset deals in Canada also bring added execution friction. One key example is the transfer of contracts: unlike in the US, where many contracts can be assigned without the other party's consent, Canadian contracts may require consent or novation, resulting in the buyer needing to enter into a new agreement with the counterparty and the seller being formally released from ongoing obligations. This added step often requires more negotiation and can extend deal timelines. These added layers of complexity make asset deals more burdensome and less appealing – especially for US buyers who are unfamiliar with these nuances. As a result, many acquirors arrive expecting to do an asset deal, but end up pivoting to a share deal once they grasp the legal and logistical costs of doing otherwise.

In public M&A, this distinction flattens out: the vast majority of public transactions in both countries are structured as share purchases, take-over bids or court-approved plans of arrangement.

Allocating risk

How Canada and the US split the burden

When Canadian and American parties sit down to negotiate a purchase agreement, they often discover that familiar deal terms carry different market expectations. The way each side thinks about risk, representations and indemnities stems from different commercial traditions.

In US private M&A, buyers are accustomed to broad, often unqualified representations and warranties. Survival periods for general reps commonly range between 18 and 24 months, and indemnity caps often allow for higher exposure thresholds. US practice also tends to accept longer survival periods and higher caps in transactions without representation and warranty insurance (RWI).

Canadian private M&A practice reflects a more conservative approach. Indemnity survival periods frequently fall between 12 and 24 months and Canadian deals feature tighter liability caps – most often well below the purchase price – and a stronger preference for contractual qualifiers like knowledge or materiality on representations. And while RWI adoption in Canada has narrowed some of the historical differences in indemnity practice between Canada and the US, Canadian deals continue to have shorter survival periods and a more ascertainable and certain allocation of post-closing risk.

In public M&A, indemnities are generally absent altogether, but the underlying approach to risk allocation still differs. In Canada, boards manage risk through procedural safeguards like special committees, fairness opinions and detailed process documentation aimed at demonstrating that directors met their fiduciary duties. In the US, where shareholder litigation risk is higher and fiduciary duties are framed more narrowly around shareholder value, boards rely more heavily on robust disclosure as a risk management tool.

Fiduciary duties

A broader mandate in Canada

While fiduciary duties underpin board decisions in both Canada and the US, the legal standards diverge in ways that can impact M&A strategy.

In the US, directors owe duties primarily to shareholders. Under Delaware law, landmark cases like *Unocal*¹ and *Revlon*² define the board's role primarily as maximizing shareholder value, particularly in a sale context. Directors must carefully justify defensive measures and act in the best financial interest of shareholders.

In Canada, fiduciary duties are owed to the corporation itself, a broader obligation codified in the *Canada Business Corporations Act*³ and affirmed by the Supreme Court in the *BCE*⁴ decision. Canadian directors are expected to consider not only shareholder value but also the interests of employees, creditors, the environment and the long-term health of the enterprise, among others.

This company-centric approach means Canadian boards may have more latitude to reject a bid that offers a higher price if doing so better serves the corporation's broader interests. However, it also means directors face closer regulatory scrutiny over the fairness and transparency of their decisions.



¹ *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985).

² *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986).

³ *Canada Business Corporations Act*, RSC 1985, c. C-44, s. 122(1.1).

⁴ *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69, [2008] 3 S.C.R. 560.

Dissent rights

Shareholder exit and deal risk

Dissent rights offer shareholders a statutory mechanism to opt out of certain fundamental transactions and demand payment of fair value for their shares.

In Canada, dissent rights are relatively broad. Under the *Canada Business Corporations Act* and provincial corporate statutes, shareholders can dissent from resolutions approving key transactions, such as significant acquisitions, amalgamations or going-private deals and seek negotiated or court-determined fair value for their shares.

In the US, dissent (or appraisal) rights are typically narrower in scope. Governed by state law, they mainly apply to mergers and certain consolidations and can sometimes be waived. While appraisal proceedings in the US are often litigated and involve detailed valuation disputes, the legal framework is more prescriptive and less flexible than in Canada.

For cross-border transactions, especially those involving Canadian targets, buyers should assess the potential impact of dissent rights, which can affect the certainty of consideration in deal pricing. This risk is particularly relevant in transactions structured as plans of arrangement, where dissent rights are integral to the approval process.

Shareholder rights plans

A tale of two philosophies

Shareholder rights plans (or “poison pills”), a common defensive mechanism boards use to deter hostile takeovers by making unsolicited bids economically unattractive or procedurally difficult, reflect one of the sharpest contrasts between Canadian and US takeover defenses.

In the US, rights plans are a well-established tactic for boards seeking to fend off hostile takeovers. Delaware law allows boards to adopt a rights plan unilaterally without shareholder approval, provided it meets fiduciary standards articulated in landmark cases like *Unocal* and *Revlon*. The test is that the board must reasonably perceive a threat and adopt proportionate defenses aimed at protecting shareholder value. These plans allow boards to delay a hostile bid, negotiate with potential acquirors or seek alternative transactions in the best interests of shareholders.

Canada, by contrast, takes a regulator-led approach. It is securities regulators rather than courts who oversee the application of rights plans, including determining how long a rights plan can remain in force. The prevailing view of the Canadian Securities Administrators (CSA) is clear: rights plans are legitimate only as temporary measures to ensure a fair auction process or protect shareholder choice, not to block unsolicited bids indefinitely. Once those objectives are met, regulators will typically cease-trade the plan. Since the introduction of the 105-day minimum bid period in 2016, this principle has been reaffirmed in high-profile cases *CanniMed/Aurora*⁵ and *Brookfield/Inter Pipeline*⁶. The message to boards and buyers alike is simple: rights plans in Canada generally buy time – but only time.

For US acquirors, especially those accustomed to using rights plans as sustained barriers to hostile bids, the Canadian approach demands a mindset shift.

For a deeper dive into rights plans considerations in Canada-US cross-border M&A, refer to our previous insight [Poison pills across borders: Navigating shareholder rights plans in Canada and the US](#).

⁵ *Aurora Cannabis Inc. (Re)*, 2018 ONSEC 10.

⁶ *Brookfield Infrastructure Partners L.P. (Re)*, 2021 ABASC 100.

Employment law

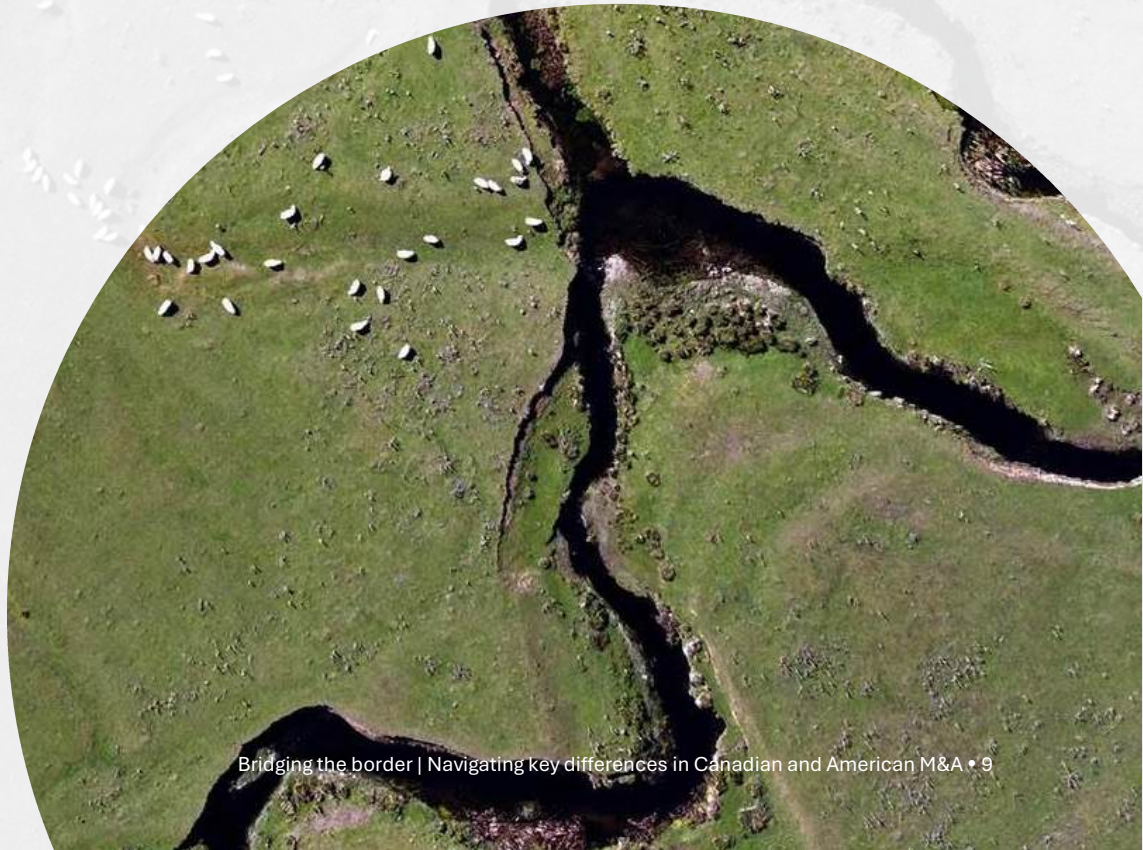
Employees and the human side of the deal

In a cross-border acquisition, employment law is another source of divergence and potential liability.

In the US, the doctrine of employment-at-will gives employers broad latitude to terminate employees without cause or notice (subject to contract or statute). In Canada the story differs. Employees have common law entitlements to reasonable notice or severance, even with a termination clause in their contract. This applies across the board, from hourly staff to executive leadership.

This matters most in asset deals. In the US, buyers typically make new offers to employees. In Canada, the transaction itself terminates employment by law and if a buyer fails to offer continued employment on comparable terms, or mishandles the transition, liability for wrongful dismissal or past service may follow. Unless transition planning is handled with care, it's not uncommon for a buyer to inherit unexpected employment-related exposure.

In public deals, severance obligations or collective agreements can also create unexpected liabilities, especially if a foreign buyer is not well-educated on the target's labour laws.



Regulatory clearance

Different thresholds, different mindsets

No one likes surprises in a closing timeline, but regulatory review is another area where the US and Canadian processes can unexpectedly diverge, both in form and in philosophy.

In the US, the *Hart-Scott-Rodino Act*⁷ establishes a clear, size-based threshold for antitrust filings. If your deal is large enough, you file, pay the fee and wait the statutory period. The Committee on Foreign Investment in the United States (CFIUS) review is a separate focused process for foreign investment in sensitive sectors. With the notable exception of transactions involving CFIUS review and large transactions that substantially exceed the US antitrust filing threshold, regulatory clearance is typically predictable and procedural – a box to check, not a deal-breaker.

In Canada, regulatory clearance runs through two channels. The *Competition Act*⁸ requires notification for transactions above certain size thresholds, with potential for in-depth review in concentrated markets. While most reviews are cleared on a timely basis, complex cases or overlaps in market share can result in extended scrutiny by the Competition Bureau. Separately, the *Investment Canada Act* (ICA)⁹ applies to foreign acquisitions of Canadian businesses. Most deals require only notification, but certain transactions trigger a formal “net benefit” review. More critically, the ICA’s national security review can apply to any acquisition, regardless of size or sector, and tends to be equally or even less transparent than its US counterpart under CFIUS, with reviews often stretching on for months.

The practical takeaway? Buyers need to build in significant lead time and anticipate regulatory uncertainty when acquiring cross-border targets. With the renewed emphasis on tariffs and tightening of borders and national security, we anticipate increased regulatory scrutiny and longer review timelines across the border and around the globe.

For insights on navigating tariff risks, refer to our previous insight [Key considerations to effectively navigate tariffs in cross-border M&A.](#)

⁷ *Hart-Scott-Rodino Antitrust Improvements Act of 1976*, 15 U.S.C. § 18a.

⁸ *Competition Act*, RSC 1985, c C-34.

⁹ *Investment Canada Act*, RSC 1985, c 28 (1st Supp).

Tax planning

Invisible lines, real money

Tax considerations can upend even the best-laid deal plans – and in cross-border M&A, even the basics of who pays what, when and where can differ significantly.

In Canada, one surprise for US buyers is the obligation of a buyer to withhold 25% of the purchase price when buying “taxable Canadian property” from a non-resident seller, unless a clearance certificate under Section 116¹⁰ is obtained from the regulators. Taxable Canadian property is, primarily, real estate and shares that derive most of their value from real estate. This rule applies to both public and private deals and is strictly enforced. Miss it, and the buyer is on the hook.

In the US, meanwhile, elections under sections 338(h)(10)¹¹ or 336(e)¹² allow buyers to treat certain stock deals as asset purchases for tax purposes, tools not readily available in Canada. In US equity sale transactions, it is also important to evaluate the availability of tax-deferred “reorganization” treatment and/or qualified small business stock treatment, which can allow sellers to defer or reduce their capital gains tax liability.

The net result? Early tax advice is critical in cross-border deals – and can save millions in unforeseen liabilities.

¹⁰ *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), section 116.

¹¹ Internal Revenue Code § 338(h)(10), 26 U.S.C. § 338(h)(10).

¹² Internal Revenue Code § 336(e), 26 U.S.C. § 336(e).

Execution and disclosure

Closing the loop

Even when everything else lines up, differences in execution mechanics and disclosure can cause last-minute friction.

Canada is generally more flexible when it comes to execution: electronic signatures are widely accepted, notarization is rare, and wet ink is seldom required. In the US, while electronic execution is becoming more and more prevalent, and notarization is only required in specific contexts like real estate conveyances, it's important to note that acquisition financing sources still frequently require formalities like the delivery of wet-ink signatures, incumbency certificates and notarized copies, even where electronic or facsimile signatures are legally sufficient.

On disclosure, US public M&A comes with stricter requirements under SEC rules, with prompt, detailed updates expected throughout the process. The Canadian securities laws can be different province by province and may be less onerous, simply not applicable to a foreign buyer, or explicitly satisfied by compliance with SEC rules, but public acquirors still need to manage disclosure and investor communications carefully.



Cross-border M&A between Canada and the US is one of the most-active and opportunity-rich corridors in the global market. But surface similarities in language, business culture and legal heritage can mask meaningful differences in deal structuring, execution and shareholder rights.

For buyers and sellers alike, success in this environment means more than just translating legal jargon in documents. It requires understanding tax implications, employment liabilities, regulatory hurdles, fiduciary duties, shareholder dissent risks and boardroom dynamics – all of which differ across the border. Mastering these nuances can turn transactional challenges into lasting value.

For deeper perspectives on private equity dynamics, refer to our previous insight [From caution to comeback: Navigating cross-border private equity in 2025](#) and for how AI is reshaping cross-border M&A, refer to our previous insight [Deals, data and deep learning: Navigating generative AI in cross-border M&A](#).



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An aerial photograph of a rugged, mountainous landscape. A winding river flows through the valley, and a small settlement is visible on the right side. The terrain is steep and rocky, with patches of vegetation. The overall scene is one of natural beauty and isolation.

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