

# Monday M&A Minute – How Should You Structure the Deal?

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In considering the sale or purchase of a business, the seller and buyer must decide from the outset whether to structure the transaction as a share purchase or an asset purchase.

In a share purchase, the buyer acquires the target's shares directly from the selling shareholders and, in doing so, indirectly acquires all assets, rights, and liabilities of the business. In a transaction where the buyer is another company, the target company continues to exist and typically becomes a subsidiary of the buyer or merges with the buyer. Situations involving the target merging with the buyer, (including the more common case where the buyer has created a wholly owned subsidiary to function as an acquisition company), are a topic for another article.

By contrast, in an asset purchase the buyer only acquires the specific assets it identifies and only assumes the liabilities it chooses, subject to liabilities imposed by law. This "pick and choose" approach gives buyers significant flexibility, since they do not waste money on unwanted assets, and there is less risk of inheriting unknown or undisclosed liabilities.

However, there is a trade-off when structuring the transaction as an asset purchase. Asset purchases are considerably more complex. They require separate transfers for each asset and liability, bills of sale for tangible assets, assignment and assumption agreements for contracts, transfers of title for real property, and assignments of intellectual property and related filings with the Canadian Intellectual Property Office and/or United States Patent and Trademark Office updating ownership. While third-party consents are needed on both types of transactions (consent to assignment for asset sales and consent to change of control for share deals), typically most contracts will have a clause restricting assignment, but not necessarily restricting change of control. This makes a share purchase more palatable. Furthermore, all of the factors that need to be considered in an asset purchase can delay closing and cause asset deals to drag on for longer than share deals.

According to a recent Thomson Reuters deal survey, a review of 60 Canadian private M&A agreements revealed 73% were share purchases and 23% were asset purchases (4% were a hybrid of share and asset deals), continuing a multi-year trend favouring share deals. For deals valued over \$100 million, 24% were asset purchases, showing that even at the larger end of the market, both structures remain in play.

If you are a buyer seeking maximum control over what you are acquiring, an asset purchase may suit you. If speed and simplicity matter more, a share purchase can often be closed on a quicker timeline. Either way, understanding the structural choice is key to protecting your interests and understanding the interests of the other side.

In Canada, sellers will generally favour a share deal, given tax and liability considerations, including the lifetime capital gains exemption. These are additional topics for a future article.

If you are interested in learning more about the process of selling your business, or are seeking to purchase a business, please contact the author. A PDF version is available for download [here](#).

*(This blog is provided for educational purposes only, and does not necessarily reflect the views of Gardiner Roberts LLP).*

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