



Canada Cross-Border De-SPAC Transactions: What U.S.-Listed SPACs and Canadian Companies Need to Know

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Key Highlights

- SPAC IPO activity has declined but de-SPAC transactions have proven resilient.
- U.S.-listed SPACs are searching for targets internationally, creating opportunities for Canadian companies.
- Key considerations for de-SPACs include transaction structure, tax treatment and finding the right Canadian target.
- A Plan of Arrangement is a unique Canadian process that may be included in a cross-border de-SPAC.

Market Overview

The special purpose acquisition company (SPAC) IPO boom of 2021 fizzled in 2022 as SPAC IPO activity declined sharply—a trend that will likely continue in 2023. In 2021, there were a record-breaking 613 SPAC IPOs whereas, as of March 2023, there have only been seven SPAC IPOs.¹ This marked decrease in SPAC IPO activity has been driven by rising interest rates, inflation and changes in the regulatory landscape due to increased scrutiny by the SEC. That said, mergers between U.S.-listed SPACs and targets (a "de-SPAC" transaction) have proven to be more resilient than might be expected, as new business combinations are still being announced weekly.

Current Opportunities and Trends

As of the end of March 2023, there are approximately 300 U.S.-listed SPACs searching for targets,² and while this number is lower than in previous years there is still intense competition for high-quality companies with high-growth stories. As a result, U.S.-listed SPACs are looking abroad to foreign markets, including Canada. This is creating opportunities for Canadian companies interested in becoming listed on a U.S. stock exchange upon the closing of a de-SPAC.



The de-SPAC route offers young, fast-growing Canadian companies a faster path to becoming a U.S. public company than the traditional IPO route, with the benefit of greater market certainty, flexibility to structure deals in their favor, strategic partnerships with a quality sponsor and wider access to capital and liquidity.

Cross-Border Considerations

Structure

In a Canadian cross-border de-SPAC transaction, unless a Canadian target converts to a U.S. company (an expensive process with potentially significant adverse Canadian tax implications for the Canadian target), the preferred options are for the Canadian target to either become the U.S.-listed entity (in which case the Canadian target becomes the ultimate parent) or to enter into an arrangement with a U.S.-listed SPAC to swap its shares for U.S.-listed shares upon closing of a business combination (in which case the U.S.-listed SPAC becomes the ultimate parent).

It is also critical that the existing shareholders and management of a Canadian target consider and understand the implications of becoming a U.S.-listed company (including SEC registration, compliance and legal/accounting issues).

Bennett Jones is acting as counsel to Borealis Foods Inc. in one of the most recently announced cross-border de-SPACs and acted as counsel to Gateway Casinos & Entertainment Limited in December 2019 in one of the first proposed cross-border de-SPACs.

Redomiciliation

In some de-SPAC transactions, the SPAC may be an entity incorporated outside of the United States but listed on a U.S. stock exchange. In these situations, the foreign SPAC may elect to redomicile in the Canadian jurisdiction of the target in order to complete a business combination under the governing law of the Canadian target (with the shares of the merged entity being listed on a U.S. stock exchange). This redomiciling may be necessary to implement a tax efficient de-SPAC transaction and resulting corporate structure. For example, a Cayman Island incorporated SPAC that is listed on the New York Stock Exchange (NYSE) that has identified a target in Ontario may redomicile (or "continue") into Ontario and complete a business combination (via a statutory plan of arrangement or amalgamation) under Ontario law. This merged Ontario entity would have to file a proxy statement/prospectus to register and list its shares on the NYSE, however, many of the de-SPAC steps and documents would be governed by Ontario law (under this example).

Bennett Jones acted as counsel to Decarbonization Plus Acquisition Corporation IV in its C\$1.39 billion business combination with Hammerhead Resources Inc. to form Hammerhead Energy Inc. The deal was completed in February 2023.

Exchangeable Share Structure

As mentioned above, a key factor in determining the appropriate structure for a de-SPAC transaction is the Canadian target's shareholder base. If the shareholder base comprises mostly Canadians, an exchangeable share structure may particularly attractive, as



it can provide a tax deferral to the Canadian shareholders of the Canadian target upon completion of the de-SPAC transaction. The key steps typically include:

- The U.S.-listed SPAC incorporates a new Canadian corporation (ExchangeCo), whose share capital would include exchangeable shares entitling the holder to exchange such shares for shares of the U.S.-listed SPAC.
- U.S. shareholders of the Canadian target exchange their shares in the Canadian target for U.S.-listed SPAC shares.
- Canadian shareholders of the Canadian target exchange their shares in the Canadian target for exchangeable shares in ExchangeCo. The exchange would occur on a tax-deferred "rollover" basis.

Under this structure, no Canadian tax is paid on any gain by Canadian shareholders until such time as the ExchangeCo shares are exchanged for SPAC shares (either at the option of the holder, or upon a mandatory conversion in certain circumstances).

Bennett Jones acted as advisor to CF Acquisition Corp. VI (a SPAC sponsored by Cantor Fitzgerald) in its US\$2.1 billion combination with video platform Rumble Inc., using an exchangeable share structure. The de-SPAC was completed in September 2022.

Documentation and Timing Considerations

A unique aspect to a Canadian cross-border de-SPAC transaction is that it may include a plan of arrangement, a court-sanctioned process available under Canadian corporate legislation which can be used to implement transactions negotiated between the parties such as an exchange of securities, an amalgamation (merger) or a transfer of assets from one party to another. Ultimately, the "plan" is approved by a judge on the basis of the fairness of the transactions contemplated to the company and shareholders. While Canadian companies, and their lawyers, are familiar with this process, most non-Canadian entities (such as a U.S.-listed SPAC) are not, and education and guidance around the process is required.

The timing of a Canadian cross-border de-SPAC is similar to a domestic U.S. de-SPAC, as both are primarily driven by the preparation of the proxy statement/prospectus and the review/response process with the U.S. Securities and Exchange Commission. It is, however, worth noting that there may be specific timing considerations to be addressed in a Canadian cross-border de-SPAC, such as the availability of the courts in connection with the plan of arrangement, the preparation of a non-offering prospectus which requires review and approval from the applicable Canadian securities commissions and, if applicable, the continuance process for the SPAC into Canada.

Tax Considerations

Canadian cross-border de-SPAC transactions are highly complex. The analysis and structuring process can be very nuanced and driven by Canadian and U.S. tax considerations based on various factors, including the composition of a Canadian target's shareholder base and business operations. For example, the structure of a de-SPAC transaction involving a Canadian target that is a "start-up" (with low historic capital and a high valuation) will likely be different from the structure of a de-SPAC transaction involving a "mature"



Canadian target. In other words, there is no "one-size-fits all" approach to structuring de-SPAC transactions.

Searching for the Right Canadian Target

The competition to find high-quality targets has intensified over the past few years. In the most recent SPAC boom, SPACs have been increasingly looking abroad to foreign markets, such as Canada, to find high-quality targets. As Canadian companies excel in many high-growth sectors, it is no surprise that companies such as Lion Electric (electric truck/bus manufacturer), Rumble Inc. (technology), Li-Cycle (lithium battery recycler), Clever Leaves (cannabis) and Hammerhead (energy) have been recent successful de-SPAC targets. In Canada, high-growth sectors include:

- high tech;
- fintech;
- clean tech;
- energy (including renewable energy such as hydro, solar, wind, battery and geothermal);
- cannabis;
- ESG focused;
- industrial; and
- leisure.

How Bennett Jones Can Help

The SPAC IPO may be gone (for now) but the de-SPAC lives on. Bennett Jones' cross-border transactions team has deep ties to the Canadian and U.S. business and legal communities, and provides tailored legal advice for U.S. and other international clients doing business in Canada. To discuss how the team can assist in de-SPAC and other cross-border transactions, please contact Gordon Cameron, Thomas Bauer or Xenia Wong.

At the ABA International Law Section Annual Conference to be held in New York in May 2023, Gordon Cameron will lead a panel on trends, structures, and strategies for cross-border de-SPAC transactions by US-listed SPACs. Information on the event is available [here](#).

¹ SPACInsider - <https://www.spacinsider.com/data/stats>

² SPACInsider - <https://www.spacinsider.com/spacs>

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