The Technology M&A Review

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The Law Reviews

THE TECHNOLOGY M&A REVIEW

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PREFACE

Welcome to the initial annual *Technology M&A Review*. This addition to the Law Review series grew out of discussions between the publisher and editor in late 2019 and early 2020. Like every contributor to this book, I am an active M&A practitioner. As such, it seemed fair to agree to an annual review in the late days of 2019 and early days of 2020. If there is one thing M&A lawyers can do, it is put out words.

I know I do not need to explain why 2020 was and is a different year than most. The first quarter buffer that most practitioners would use to write in was slowly eroded by the growing viral threat of covid-19. Then the second quarter was 'consumed by trying to consume' the meaning of that present not only on a global basis, but for each firm contributor here, and her or his family.

And yet, the publisher and each member of its staff continued to support the project, and gently nudged it forward. It and they each deserve credit in large part for whatever is well done in this book.

And so we have an annual review that looks backward to the nadir of 30 June 2020, for the most part. In retrospect, this will be the base date that future reports will reference and so, serendipitously, it is the right base date.

As you can see from the book's contents, technology M&A has been vibrant over the past 30 years. Even compared to the awful decline registered by all M&A activity measured at 30 June 2020, technology M&A far outpaced every other category of M&A. As of the writing of this preface in October 2020, technology M&A (excluding bankruptcies and workouts) in terms of growth in value and numbers continues that champion's jog around the track; the race is not even close.

Why? Growth prospects and resiliency. While the technology M&A sector shares its DNA with other sectors, it is a growth sector even though it is ubiquitous, and in its nature is designed to be changeable. We all intuitively know one cannot change the design of a gas turbine on the fly, but one can change a lot in the technology space without worrying about much physical harm.

Embedded in the previous paragraph is a rate of change equation of sorts. For most technology applications that do not involve life or death functions, there is no competitive limit on the rate of change. There was, in effect, no social media industry in 2000, and now it is quite difficult to actually describe it, and yet it is huge. There have unbelievable advances in, inter alia, food production and power plants since that same date, but no one thinks of these as growth industries. These industries are thought of, consciously or unconsciously, as recipients of technology but not creators of technology.

This book's goal is to both highlight the similarities and differences between technology M&A and 'normal' M&A, without taking too much time to try to define what technology and normal are in that context. One of its unstated premises is that because of technology's importance, effective technology lawyering in M&A necessarily involves and requires a broad set of legal skills across many practice areas; and that requirement will likely increase as governments and interest groups from all spectrums focus on the sector. The sector is critical because it is 'where the money is', where the anticipated growth is and where, at least in the Western world, the political battles are and will go.

At least as of the time of writing this in late October 2020, technology M&A in the US is robust, reflecting its advantage in a digital world. As noted in the book, the duration of that vibrancy is a function of how long traditional economic pursuits are locked down or restricted by covid-19.

Michael J Kennedy
Paul Hastings LLP
San Francisco
October 2020

Chapter 4

CANADA

Richard Corley, Allan Goodman and Michelle Vigod[1]

1 OVERVIEW

Deals in the technology sector represented the largest share (18 per cent) of overall transaction activity in Canada in 2019.[2] For deals involving private equity funds, the technology sector represented 17 per cent of deal flow in 2019 and 14 per cent of deal flow in the first quarter of 2020.[3] The available data does not account for the impact of covid-19 on the market following Q1 2020.

The government has fostered an environment leading to the growth of Canada's technology sector, with tax incentives and immigration policies that support the growth of tech companies, in addition to a large pool of skilled labour and venture capital dollars put to work in the sector. Canada's demonstrated leadership in financial technology, digital health, software as a service (SaaS) and artificial intelligence (AI) has created considerable deal activity in the technology sector, which is likely to continue.

II YEAR IN REVIEW

i Overview

Canada recorded US$160 billion in deal activity in 2019, with technology deals comprising the largest share of overall transaction activity.[4] The Canadian technology sector has flourished in recent years, in part due to favourable immigration policies, a skilled workforce, ample venture capital and supportive tax incentives. Several notable technology M&A transactions have been completed within the past two years, including the three significant transactions noted below.

a On 28 March 2018, Motorola Solutions,[5] a provider of communication solutions, acquired Avigilon Corporation,[6] a leader in advanced video surveillance and analytics. The total enterprise value of the acquisition was US$1 billion.

1 Richard Corley, Allan Goodman and Michelle Vigod are partners at Goodmans LLP.
2 PWC M&A Year in Review and 2020 Outlook: https://www.pwc.com/ca/en/services/deals/2020-mergers-and-acquisitions-outlook.html.
3 2019 PE Report and Q1 2020 PE Report, online: Canadian Venture Capital and Private Equity Association: https://www.cvca.ca/research-insight/market-reports/.
4 PWC M&A Year in Review and 2020 Outlook: https://www.pwc.com/ca/en/services/deals/2020-mergers-and-acquisitions-outlook.html.
5 New York Stock Exchange (NYSE): MSI.
6 Toronto Stock Exchange (TSX): AVO.

b On 21 February 2019, BlackBerry Limited,[7] a provider of security software and services to enterprises and governments, acquired Cylance, a privately held AI and cybersecurity company. The aggregate consideration paid by Blackberry was approximately US$1.4 billion.

c On 24 December 2019, OpenText,[8] a global leader in enterprise information management, acquired Carbonite, Inc,[9] a provider of cloud-based subscription data protection, backup, disaster recovery and endpoint security to small and medium-sized businesses and prosumers. The total purchase price was approximately US$1.45 billion.

ii Private equity transactions

The Canadian Venture Capital Association reported a decrease in Canadian private equity M&A deal volume from 590 deals in 2018 to 529 deals in 2019; and, a decrease in total deal value from C$22.7 billion in 2018 to C$19 billion in 2019.[10] Despite the overall decline in Canadian private equity M&A during 2019, the technology sector accounted for the second-largest proportion of private equity M&A deals in Canada, totalling over C$3 billion.[11] The most significant private equity deals in the technology sector included the following:

a On 30 May 2019, Thoma Bravo LLC, a private equity firm with over US$35 billion in investor commitments, acquired AutoData Solutions Group, a provider of data and software solutions that power the automotive ecosystem. The transaction was valued at C$1.35 billion.

b On 21 February 2020, Great Hill Partners, a leading growth-oriented private equity firm, announced the closing of its acquisition of VersaPay Corporation,[12] a market-leading provider of an SaaS accounts receivable, invoicing and integrated payments technology platform. Great Hill Partners has over US$2.7 billion under management, investing in mid-market companies with a focus on the consumer, digital infrastructure, financial technology, healthcare and software sectors. The deal was valued at C$126 million.[13]

7 NYSE: BB; TSX: BB.

8 NASDAQ: OTEX; TSX: OTEX.

9 NASDAQ: CARB.

10 2019 PE Report and Q1 2020 PE Report, online: Canadian Venture Capital and Private Equity Association: https://www.cvca.ca/research-insight/market-reports/.

11 Darrell Pinto, David Kornacki and Jon Jackson, 'Private Equity Canadian Market Overview // 2019' (pdf): Canadian Venture Capital and Private Equity Association, www.cvca.ca/files/reports/2019-canadian-market-overview-report/CVCA_EN_Canada_PE_2019_Final-Mar13.pdf.

12 TSX Venture Exchange: VPY.

13 https://www.versapay.com/blog/great-hill-partners-makes-all-cash-offer-to-acquire-versapay-corporation.

c The first quarter of 2020 displayed a strong rebound in private equity M&A, with 129 deals valued at C$4.7 billion,[14] which is more than double the total deal value seen in the first quarter of 2019.[15] While private equity M&A showed a strong rebound at large, the technology sector had one of the lowest deal size totals with C$50 million.[16]

III LEGAL AND REGULATORY FRAMEWORK

i Plans of arrangement

Under most Canadian corporate statutes, the target board's approval is required to proceed with an arrangement. Therefore, in most Canadian jurisdictions it is not possible to use these mechanisms for hostile transactions.

Arrangements generally require the approval of two-thirds of the votes cast at a meeting of a target's voting shareholders. Shares held by a buyer and its joint actors count toward this approval. If a transaction is subject to the Multilateral Instrument 61-101 Protection of Minority Security Holders in Special Transactions under the applicable Canadian securities law, it may also require the approval of a majority of the target's shareholders, excluding shares held by the buyer and its joint actors.

An arrangement must be approved by the court in the target's governing jurisdiction. Generally, two orders need to be obtained from the court for an arrangement:

a an interim order that confirms the process for obtaining shareholder approval and generally provides for shareholders' dissent rights (accompanied by the right to be paid fair value for their shares); and

b a final order that approves the arrangement if the court is satisfied the transaction is fair and reasonable to the target's security holders.

Dissent rights are rarely exercised in Canada. The appraisal arbitrage that has become common in the US in recent years has for the most part not taken hold in Canada. Nevertheless, it is customary for buyers in Canadian going-private transactions to include a maximum threshold for dissents as a condition to closing.

ii Takeover bids

Canadian securities laws contain numerous procedural and substantive rules about the conduct and terms of formal takeover bids primarily intended to protect the interests of a target's shareholders.

All target shareholders must be offered an identical price. It is permissible to offer shareholders an identical choice of consideration, such as a choice of cash and shares, subject to proration if shareholders elect more than the maximum amount of cash or shares that the buyer is prepared to pay. Any increase in the purchase price must be paid to all tendering shareholders, even if their shares have already been purchased under a bid.

14 https://www.cvca.ca/files/reports/2020-q1-vc-pe-canadian-market-overview/CVCA_EN_Canada_PE_Q1_2020_UpdatedJune8.pdf - page 4.

15 Darrell Pinto et al, 'Private Equity Canadian Market Overview // Q1 2020' (pdf): Canadian Venture Capital and Private Equity Association, www.cvca.ca/files/reports/2020-q1-vc-pe-canadian-market-overview/CVCA_EN_Canada_PE_Q1_2020_UpdatedJune8.pdf.

16 https://www.cvca.ca/files/reports/2020-q1-vc-pe-canadian-market-overview/CVCA_EN_Canada_PE_Q1_2020_UpdatedJune8.pdf.

Subject to certain exceptions that may reduce the deposit period, a takeover bid must be open for an initial deposit period of at least 105 days. No shares can be purchased under the bid – and any shares previously tendered may be withdrawn – at any time before the applicable minimum deposit period expires.

A takeover bid may not be subject to a financing condition. The bidder must make adequate arrangements before the bid to ensure it has the funds available to purchase all tendered shares if all conditions to the bid are satisfied or waived. Financing arrangements should generally be subject to the same conditions as the bid or other conditions that have only a remote chance of not being satisfied if the bid conditions are satisfied.

A bidder cannot purchase any shares under its bid unless, when the applicable minimum deposit period expires, more than 50 per cent of the target's shares (excluding shares owned by the bidder and its joint actors) have been tendered and not withdrawn. If the mandatory minimum tender condition is satisfied, and all other terms and conditions of the takeover bid have been complied with or waived, the bidder must purchase all shares tendered, extend the bid for at least 10 days and purchase any shares deposited during the extension.

Even after the most successful bids, bidders will invariably have to undertake a second-step transaction to acquire the target shares that were not tendered. If at least 90 per cent of the shares subject to a bid are tendered to the bid within 120 days of the bid date, the bidder has a statutory right to acquire all remaining shares on the same terms as the bid. If the bidder owns at least two-thirds of the target's voting shares following expiry of the initial bid, the bidder can undertake an amalgamation (or plan of arrangement) to acquire or squeeze out the remaining shares that were not tendered to the initial bid.

While shareholders are not entitled to dissent in connection with a takeover bid, dissent rights are available to target shareholders if the bidder proceeds with either a compulsory acquisition or an amalgamation squeeze out.

iii Fiduciary duties

Directors of Canadian corporations have a general fiduciary duty to manage or supervise the management of the business and affairs of companies and, in carrying out this mandate, must act honestly and in good faith with a view to the best interests of a company; and exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances. In determining what is in the best interests of the company, directors may, depending on the circumstances, consider the interests of shareholders, creditors, employees, consumers, governments and other groups of stakeholders.

Canadian directors – unlike their US counterparts – are not subject to a duty to obtain the highest price reasonably available for shareholders, even when they decide to pursue a sale of a company. Rather, when evaluating a potential sale of a company, Canadian directors are subject to the same general fiduciary duties described above and, if those duties are fulfilled, the business judgement rule will apply. As a result, Canadian directors have significant flexibility when negotiating a potential sale of a company. As a practical matter, however, obtaining the highest price reasonably available for shareholders tends to be an important focus of most target boards in Canada (so long as a transaction is fair to the company's other stakeholders).

The business judgement rule provides that if a board's decision is free from conflicts of interest and the directors are sufficiently informed, a court should not second-guess the decision so long as it is within a range of reasonable alternatives that were available to the board.

A Canadian board is not required to conduct an auction or follow any other particular process if it decides to pursue the possible sale of a company. The business judgement rule allows a board to structure the sales process in a manner it believes will achieve the best outcome for the company and its stakeholders.

IV KEY TRANSACTIONAL ISSUES

i Company structures

In Canada, the most common business structure involved in M&A transaction is the corporation, although some companies may be structured as a partnership (general or limited).

ii Deal structures

Public

Most acquisitions of Canadian public companies are structured either as an arrangement (a one-step transaction similar to a US merger) or a takeover bid (a two-step transaction similar to a US tender offer).

A takeover bid is the only structure that allows a buyer to proceed in a hostile or unsolicited transaction, without the support of a target's board. While both structures can be used for friendly or negotiated transactions, most are structured as arrangements due to the flexibility of the arrangement process.

An arrangement is a flexible statutory procedure that allows a buyer to acquire 100 per cent of a target in a single step, and requires court approval. It allows the parties to specify in a plan of arrangement precisely how the target's securities will be acquired or otherwise dealt with (notwithstanding the terms of the target's governing documents and incentive plans), and to carefully sequence any related transaction steps to facilitate tax planning and other structuring objectives.

A takeover bid is an offer made directly to a target's shareholders where the number of shares subject to an offer (combined with shares already owned or controlled by the bidder and its joint actors) represents 20 per cent or more of the shares of that class. Individual shareholders decide whether to tender to the bid and, if enough shares are tendered, the buyer can usually undertake a second-step transaction to acquire any shares not tendered to the bid. Absent an exemption, a takeover bid must be offered to all target shareholders on the same terms and must comply with detailed rules prescribed by Canadian securities law. Partial bids for less than 100 per cent of a target's shares are permitted (subject to a number of additional rules), but are generally not utilised as part of a going-private transaction.

Additional characteristics of these types of deal structures are discussed in more detail below.

Private

Three typical mechanisms are generally used by a prospective purchaser to acquire a privately held Canadian business: a purchase of shares, a purchase of assets or, less commonly, a statutory amalgamation. In some circumstances, particularly where there is a large shareholder base and complex capital structure, parties to a private M&A transaction may opt to effect a transaction by way of a court-approved statutory plan of arrangement. Acquisitions of private companies generally do not implicate takeover bid provisions of Canadian securities legislation; however, there are certain securities law-related issues that may arise, for instance when securities of a purchaser are issued as a purchase price consideration.

The determination of whether an acquisition of a private Canadian business will proceed by a share or asset purchase is driven by both tax considerations (discussed below) and non-tax considerations, and the parties' relative bargaining power. A potential buyer may be inclined to favour an asset rather than a share purchase so that it can choose the assets it wishes to acquire and the liabilities it will assume. However, in Canada, certain liabilities, such as environmental contamination of real property and collective agreements in respect of unionised employees, will, by operation of law, become liabilities of the buyer in an asset transaction even if those liabilities are not specifically assumed. There are also certain advantages for a buyer in a share transaction, including fewer conveyancing documents and consents required and a more streamlined transaction from an employee perspective.

iii Acquisition agreement terms

The terms of a given agreement largely depend upon whether a private or public company is being acquired.

In a negotiated public transaction, numerous terms are common to many deals but subject to variation dependent upon the relative bargaining power of the parties. One common set of terms pertains to deal protection measures. Two common forms of deal protection are the no-shop covenant and a break fee.

No-shop covenant

The no-shop covenant is a popular mechanism implemented by purchasers that requires a target company to terminate any solicitation or negotiations with any person other than the purchaser and discontinue access to and disclosure of all information relating to the target to any third parties. Further, the covenant restricts the target from participating in any discussions or negotiations regarding any third-party acquisition proposal and requires the target to provide prompt written notice to the purchaser of any unsolicited proposal, inquiry or offer. No-shop covenants are particularly important for purchasers in public M&A transactions since they are subject to competing bids between signing and closing. Target companies will often require a window-shop exception, which permits the target to discuss and negotiate unsolicited third-party acquisition proposals following the announcement of a deal. In a small percentage of public M&A transactions in Canada, a target company may negotiate a go-shop provision that permits the target to actively solicit and negotiate competing bids and provide confidential information to potential bidders following the execution of the acquisition agreement for a fixed period of time.

A no-shop covenant often contains an exception known as a fiduciary out clause, which allows the board of directors of the target company to take certain actions, including terminating the transaction, if the failure to do so would be inconsistent with its fiduciary duties to the company and its shareholders. If the target company receives a superior proposal, being an unsolicited competing bid that the board determines is more favourable than the incumbent transaction, a fiduciary out clause permits the board to consider and accept the bid. Before a board can exercise a fiduciary out clause, the governing agreement typically requires the target company to give the buyer the right to match the competing bid or amend its offer to provide for terms more favourable than the competing bid.

Break fee

A break fee, which is the payment of liquidated damages in a negotiated amount that the target company will make to the purchaser if the acquisition agreement is terminated in certain circumstances. This provides deal protection, as the payment of a break fee increases the acquisition cost for any third party. The break fee is typically a certain percentage of a transaction's value. A less common break fee is the reverse break fee, which is a fee paid by the buyer to the seller for failing to close an agreed-upon transaction. The reverse break fee first appeared in the private equity context and has grown in popularity. Ultimately, whether a break fee is implemented and the size of such fee are often a reflection of the parties' relative bargaining power.

While there is an overlap between public M&A and private M&A deal terms, common terms in a private M&A transaction can differ substantially from those found in public M&A transactions. The following is a non-exhaustive list of common terms found in private M&A deals.

Purchase price adjustments

A common mechanism implemented in purchase and sale agreements is a post-closing purchase price adjustment, which is a mechanism used to estimate a financial metric, such as working capital of a target company as of the closing date, and to make adjusted payments post-closing in the event the final working capital in the company differs from the estimated amount.

Material adverse effect

A material adverse effect definition is often used by a target company as a qualifier to certain representations and warranties, which has the effect of raising the standard by which the purchaser must prove a breach of the qualified representation or warranty. For example, a target company may provide a representation and warranty that the company has made all governmental filings except those that the failure to make are not reasonably likely to result in a material adverse effect. This minimises the risk that the target company goes offside of the representation or warranty. This is not typically used for fundamental representations such as title to shares or tax representations, but in other cases, it is a practical inclusion to temper representations and warranties.

A material adverse effect definition is also regularly used as a condition to closing in a purchaser's favour. This clause typically permits a purchaser to walk away from a transaction where a material adverse effect (or material adverse change) has occurred between signing and closing. This condition is also used for similar purposes in public target purchase agreements.

The definition of material adverse effect is often extensively negotiated due to the impact it can have on the value of certain representations and warranties and to the conditions to closing. In the M&A context, a typical definition of material adverse effect may be defined as any change, effect, fact, circumstance, occurrence or event that, individually or in the aggregate, is materially adverse to the business, operations, assets, properties or condition (financial or otherwise) of the target business, or that could delay or impair a party's ability to consummate the transaction. It is common practice in Canada to include certain carveouts in the definition in favour of the seller. Common carveouts are:

a changes in applicable laws;

b accepted industry-wide fluctuations or risks affecting the industry;

c changes in general economic or political conditions; and

d acts of war, terrorism and natural disasters.

Given the sudden and significant impact covid-19 has had on businesses, the definition of material adverse effects has become the subject of significant attention regarding whether such clause can be invoked during, or as a result of, the pandemic, which depends on the precise wording of each definition.

Indemnification provisions

A variety of indemnification provisions are implemented in private M&A transactions. The below noted terms are not intended to be exhaustive, but reflect notable terms recently seen in private M&A transactions.

Purchasers in private M&A deals often seek to include a 'pro-sandbagging provision' and sellers seek to include an 'anti-sandbagging provision'. A pro-sandbagging provision preserves a purchaser's right to bring indemnification claims against a seller for breach of a representation, warranty or covenant, even if the purchaser knew about the breach before closing and proceeded with closing a transaction regardless. Conversely, sellers seek to include an anti-sandbagging provision, which limits a purchaser's ability to seek recourse on matters the purchaser knew about at closing.

Another common indemnification provision is an indemnity cap, which is the upper limit of a party's financial obligation to indemnify the other party for its losses in the event a representation or warranty is untrue or a covenant is breached. The purchaser will seek a no cap or a high cap, whereas the seller will advocate for the lowest cap possible. Certain carveouts are common where any liability stemming from a breach of a fundamental representation becomes subject to either an increased cap or no cap at all. The indemnity cap is typically between 25 to 50 per cent of the purchase price,

In connection with indemnification provisions and purchase price adjustments, escrow funds are often held by a third-party escrow agent and distributed in accordance with an escrow agreement to account for such adjustments or indemnification claims made by the purchaser against the seller.

Earnout provisions

An earnout provision is a tool whereby the parties to a private M&A transaction can tie a portion of the purchase price to the subsequent performance of the target business post-closing. If the target company does not achieve the designated targets (typically a financial target), the purchaser is not obligated to make the contingent payment (or the payment is reduced). Earnouts have grown in popularity in recent years, predominantly due to a sellers' market and the ability it affords buyers and sellers to bridge gaps in valuation. Where an earnout is implemented in a private target acquisition, such provision generally stipulates the financial targets or milestones that must be achieved to trigger payment and the time periods for such targets to be met.

iv Financing

Canadian M&A deals are typically financed by both debt and equity. Where buyers rely on debt financing, M&A agreements typically include financing provisions that detail the terms of a buyer's debt financing in a debt commitment letter.

Where buyers rely on equity financing, M&A agreements typically include an equity commitment letter detailing the ability of a buyer to use equity in its purchase of a seller.

Leveraged transactions generally offer higher rates of return without large cash commitments from a purchaser's equity investors. However, investments in highly leveraged businesses are inherently riskier for equity holders considering that if a business goes bankrupt the debt must be repaid before the equity holders receive any payment. The debt-to-equity financing decision is particularly interesting in the world's current state of emergency: with low interest rates resulting from the pandemic, potential buyers could turn more towards debt financing when engaging in M&A deals in 2020 to the extent lenders are comfortable with the risk profile of a business in this new reality.

v Tax and accounting

Canada's tax regime is governed by the federal Income Tax Act (Canada) (ITA) and its regulations, as well as the sales and other tax laws of Canada and its provinces and territories. Persons planning to do business in Canada should also note that the administrative policies of the Canada Revenue Agency and the provinces are relevant to taxation in Canada.

The primary basis for income taxation in Canada is a taxpayer's residence. Canadian resident corporations are subject to Canadian tax on all of their business and property income, as well as on capital gains realised on the disposition of capital property. In Canada, 50 per cent of capital gains are taxed as income, and corporate income is taxed at different tax rates across Canada. For example, as of 1 January 2020, the combined effective federal–provincial tax rate for corporations (including non-resident corporations) carrying on business in Ontario was 26.5 per cent.

Under Part I of the ITA, individuals, trusts and corporations that are, or are deemed to be, not resident in Canada are liable for Canadian tax on certain types of Canadian-source income.

A non-resident's liability to Canadian tax may be reduced or eliminated under an applicable income tax treaty that Canada has entered into with another country. Generally, treaties provide exemptions from Canadian tax on certain types of capital gains realised by non-residents and reduced rates of withholding tax on other types of Canadian-source income. Branch tax may also be reduced by an applicable treaty.

The Canadian Accounting Standards Board requires publicly accountable enterprises to use International Financial Reporting Standards (IFRS) in preparing all interim and annual financial statements. Private companies generally have the option, but are not required, to adopt IFRS for the preparation of financial statements.

vi Cross-border issues

Canada generally welcomes investment by foreign businesses. However, Canada requires that any non-Canadian proposing to acquire an existing business in Canada or to establish a new business comply with the provisions of the Investment Canada Act (Canada) (ICA).

Under the ICA, all establishments of a new Canadian business and almost all acquisitions of control of Canadian businesses by non-Canadians are subject to notification to a department of the government. A notification can be submitted at any time up to 30 days following the establishment of a business or the closing of a transaction. The submission of a complete notification is, in most cases, the end of the process under the ICA; there is no waiting period to observe or approval to obtain. The only exception is where, following receipt of a notification, the government initiates a national security review of a new business or of the transaction. National security reviews are discussed in more detail below.

In addition, the ICA has certain rules that require that parties to a small number of transactions submit an application to the government, and obtain the approval of a government minister, before completing their transactions. In general, an application is required for transactions where the value of the Canadian business exceeds different specified thresholds (which vary depending upon the origin of the foreign investor, whether or not the foreign investor is a state-owned enterprise, and whether the Canadian business is engaged in cultural activities). For these transactions, the responsible minister will only issue an approval if he or she determines the transaction is likely to be of net benefit to Canada. This assessment is made based on the commitments that a foreign investor offers about how it intends to operate its Canadian business post-transaction (including in respect of matters such as the maintenance of employment levels). In addition, the government may initiate a national security review of transactions that are subject to an application.

As noted, any investment by a non-Canadian can be reviewed to determine if it could be injurious to Canada's national security. National security is not defined in the legislation, but the government has issued guidelines concerning the factors the government may consider when making a determination.

In addition, Canada has sector-specific legislation or foreign ownership restrictions, or both, in respect of the telecommunications industry, numerous different cultural industries, the broadcasting industry and the transportation industry, and in respect of uranium production. The financial services sector is also subject to ownership restrictions of general application, but not specific foreign ownership restrictions.

Competition law review

Federal competition legislation may also affect a person's ability to invest in Canada. The Competition Act (Canada) aims to maintain and encourage competition in Canada. The legislation creates criminal offences for serious anticompetitive activities such as price-fixing conspiracies, bid-rigging and certain deceptive marketing practices. The legislation also creates a system for civil review of business activities that could affect competition, including mergers and acquisitions of businesses.

Subject to certain exceptions, if a proposed merger or acquisition exceeds certain size thresholds, the parties to such transaction must notify the Canadian Commissioner of Competition before completing their transaction and before a waiting period expires. A notification is required, and the waiting period must be observed, if (among other requirements):

a the target business, including its subsidiaries, has assets in Canada, or revenues generated from sales made by those assets in Canada, whose value exceeds C$96 million; and
b the parties to the transaction, including their affiliates, on a combined basis together have assets in Canada or gross revenues from sales in, from or into Canada, that exceed C$400 million.

The C$96 million threshold noted in (a) above is adjusted on an annual basis.

The Commissioner will review each notification to determine if a transaction is likely to prevent or lessen competition substantially. If the Commissioner concludes that such an impact on competition is likely, she or he may bring an application for an order to prohibit the transaction from closing (or obtain other relief).

Export and import controls and sanctions

Canadian import and export controls may also be relevant to technology acquisitions. Canada has a broad and comprehensive regulatory regime for regulating exports and imports, for ensuring compliance with international sanctions and for restricting access to controlled goods (those of strategic significance or having national security implications to Canada). The Export and Import Permits Act (Canada) governs the import and export of goods and technology from and to various destinations.

While not an export control, the controlled goods programme mandates the registration and regulation of persons and entities who examine, possess or transfer defence goods as defined in Canada's Defence Production Act.

Canada also imposes trade and economic sanctions under a number of different statutes.

V IP PROTECTION

i Overview

Canada provides comprehensive protections of intellectual property (IP) rights. Canada is a party to the principal international IP treaties. In 2020, Canada also harmonised certain elements of Canadian IP law with those applicable in the United States and Mexico under the Canada-United States-Mexico Agreement (USMCA).

With the exception of trade secrets, which are generally protected under provincial law, IP rights are protected in Canada under federal statutes. While trade secrets were not previously protected under federal law, as a consequence of the USMCA, Canada has implemented limited federal criminal law protections for trade secrets.

Canada has enacted federal statutes to protect copyright, patents, trademarks, industrial designs, integrated circuit topographies and plant breeders' rights. The Canadian Intellectual Property Office (CIPO) is the patent, trademark and copyright administration body of Canada. There is also an internet domain (.ca) registrar for Canada, the Canadian Internet Registration Authority.

Copyright

The Copyright Act (Canada) grants an exclusive right to the copyright owner of any original literary (e.g., novels, magazines and computer programs), dramatic (e.g., films, videos, scripts and plays), musical (e.g., music, lyrics and instrumental compositions) or artistic works (e.g., paintings, photographs, sculptures and architectural works) to control copying and other commercial exploitation of such work. The copyright owner of a work has the exclusive right to publish, produce, reproduce, translate, broadcast, adapt and distribute the work, perform it in public, communicate it to the public by telecommunication, make it available online and authorise others to do these acts. Copyright in Canada now, after the USMCA, extends to 'not less than the life of the author and 70 years from the author's death'.

Copyright arises automatically in Canada in any original literary, dramatic, musical or artistic work, including a compilation and sound recording. Copyright belongs initially to the author of a work, except that copyright in works made in the course of employment belongs initially to his or her employer unless there is an agreement to the contrary.

The Copyright Act (Canada) expressly limits liability for copyright infringement of internet service providers and information location tools used as search engines, provided they meet the prescribed requirements.

Patents

In Canada, patents are granted under the Patent Act (Canada) for an invention. To qualify as patentable, an invention must be novel and useful, and must constitute an unobvious step. The invention may be any new and useful art, process, machine, manufacture, composition of matter or improvement thereof.

The basic principle of the legislation is that a patent is only granted to an original inventor or to his or her legal representatives. In addition, the exclusivity of a patent is granted on the basis of a first-to-file system, regardless of who may have invented first. Because of the importance of the filing date of an application, an applicant should make every effort to file at least the minimum information permitted under the Patent Act as early as possible. If a person has previously filed an application for a patent in another country with which Canada has a patent treaty, that application may have the same force and effect in Canada as if it had been filed in Canada, provided that the required application is filed in Canada within 12 months from the date of filing in the other country.

While computer programs per se are not patentable, many computer software-related inventions can be claimed as an integral part of an overall system or method. Such software inventions may be patentable if certain conditions are satisfied.

Trademarks

A trademark is a sign or combination of signs that distinguish the goods or services of a particular business from those of others. Rights are obtained through either use or registration with CIPO. Registered marks are easier to enforce and have a number of important advantages. Most importantly, registered marks are afforded protection throughout Canada, regardless of whether a trademark is used in the area where an infringer is located. In contrast, the owner of an unregistered mark or common law mark must establish the distinctiveness of the trademark in the areas in which it is to be enforced.

In June 2019, Canada acceded to the Madrid Protocol and Nice Classification and Singapore Treaty, and made significant amendments to the Trademarks Act (Canada) that affect filing, prosecution and maintenance as well as enforcement. As a result of these amendments, foreign applicants from other countries that adhere to the Madrid Protocol can file in Canada through the harmonised filing system administered centrally by the World Intellectual Property Organization, and Canadians can now use the system to seek trademark registrations abroad in Madrid Member States.

Industrial designs

The Industrial Design Act (Canada) provides for the registration by Canadians and non-Canadians of original features of shape, configuration, pattern and ornamentation applied to a finished article produced or intended to be produced in numbers greater than 50. Unlike copyright (which arises automatically upon creation) or trademark rights (which may accrue through use), industrial design rights may only be obtained by registering the design with CIPO.

VI EMPLOYMENT ISSUES

Canadian courts will generally consider non-competition covenants in employment contracts to be an unreasonable restraint on trade and unenforceable, unless a non-competition covenant is reasonable in the circumstances.

Under the Copyright Act (Canada), copyright works created by an employee under a contract of service during the course of his or her employment will be deemed to be owned by the employer. The Patent Act does not contain any similar deeming provisions. Accordingly, ownership of a patent developed by an employee during the course of his or her employment will only pass to an employer if there is a contractual duty to transfer the patent to the employer.

There is no 'at-will' employment regime in Canada. If an employee is terminated for without cause, that employee will generally be entitled to reasonable notice of termination at common law, unless the employee has an enforceable contract of employment that limits the notice of termination to the prescribed statutory minimum under the applicable employment standards legislation. There is no precise formula to determine what constitutes reasonable notice at common law, but a court will generally consider the age and length of service of the employee, the character of employment and the availability of similar employment in making a determination as to what constitutes reasonable notice.

VII DATA PROTECTION

Canada has federal, provincial and territorial privacy legislation for both the private sector (as described below) and the public sector (which is not addressed in this chapter). Organisations that collect, use or disclose personal information of Canadians are expected to comply with this legislation.

The Personal Information Protection and Electronic Documents Act (Canada) (PIPEDA) is overarching, and applies to all private sector organisations that collect, use, and disclose the personal information of Canadians in for-profit, commercial activities. The inter-provincial and international transfer of personal information is also governed by PIPEDA. Certain provinces have enacted private sector privacy legislation recognised as being substantially similar to PIPEDA. Depending on where they do business in Canada, businesses may be subject to the overlapping jurisdiction of PIPEDA and one or more specialised provincial privacy statutes.

The British Columbia, Alberta and Quebec privacy statutes govern the personal information of private sector employees in those provinces. PIPEDA, which applies in the remaining provinces, including Ontario, deals only with the personal information of public sector employees. This means that the personal information of private sector employees in the remaining provinces is not regulated by statute. In practice, however, many organisations apply consistent privacy treatment to the personal information of their employees across Canada.

A key principle of all Canadian privacy laws is that the meaningful, informed consent of an affected individual is generally required for the collection, use and disclosure of personal information, subject only to limited statutory exceptions to consent. While the federal and provincial privacy statutes are similar in many respects, they differ in their exceptions to consent with respect to employee personal information and in business transactions.

The British Columbia and Alberta statutes (and PIPEDA with respect to employee personal information of public sector employees) provide exceptions for the collection, use or disclosure of employee personal information, where such collection, use or disclosure is for the purposes of establishing, managing or terminating an employment relationship. However, an organisation must first notify the individual whose employee personal information it will be collecting, using or disclosing without consent, and the purpose therefor. The Quebec statute does not contain a similar exception; therefore, consent must be obtained for any collection, use or disclosure of employee personal information.

Similarly, each of PIPEDA and the British Columbia and Alberta statutes contain an exception, subject to certain requirements, that allows personal information to be used and disclosed without the knowledge or consent of affected individuals in the context of a prospective or completed business transaction if such personal information is necessary to determine whether to proceed with and complete a transaction; and for carrying on the business or activity that is the object of a transaction. The Quebec statute does not contain a similar exception.

VIII SUBSIDIES

The government's focus on supporting and developing Canadian technology and innovation has had a tremendous effect on boosting the growth of the technology industry in Canada in recent years. Canada's federal and provincial governments have implemented a wide range of financial support programmes to incentivise technology innovation.

Examples of federal programmes include:

a the Business Development Bank of Canada provides services to technology startups.

b Export Development Canada (EDC): technology firms engaged in, or, planning to engage in, international business can access working capital loans of up to C$1 million from EDC.

c Innovation, Science and Economic Development Canada: a federal government department that funds and administers the strategic innovation fund, the innovation superclusters initiative and the innovative solutions Canada programme, all aimed at funding Canadian technology startups.

d National Research Council Industrial Research Assistance Program (NRC-IRAP): the NRC-IRAP assists small and medium-sized Canadian enterprises by providing advisory services, networking programmes and funding for projects aimed at developing new technologies or bringing technologies to market.

Examples of provincial programmes include:

a Ontario Capital Growth Corporation: capital investments to high-growth, emerging technology companies. Funded businesses receive initial investments of up to C$5 million and lifetime aggregate investments of up to C$25 million.

b Alberta Innovates: focus on driving business growth in the bio, health, energy and technology sectors.

c BC Tech Fund: funding for companies in information and communications technology, digital media, cleantech and life sciences or healthcare.

d Nova Scotia's Innovacorp: invests alone or in collaboration with the government or private sector investors in the early stage of information technology, clean technology, life sciences and ocean technology industries.

In addition to these programmes, Canada's most widely used and renowned tax incentive for technology innovation is the scientific research and experimental development (SR&ED) programme. The SR&ED programme uses tax incentives to encourage all Canadian businesses to conduct research and development in Canada. The tax incentives come in three forms: an income tax deduction; an investment tax credit; and, in some circumstances, a refund. The programme provides over 20,000 claimants with more than C$3 billion in tax incentives annually.

IX DUE DILIGENCE

Due diligence typically focuses on the business assets and attributes most valuable to a buyer. It will be important to:

a assess the quality, validity and ownership of the IP in the technology developed by a business;
b identify and document key know-how;
c identify and secure personnel who are key to a technology's ongoing development; and
d understand and secure key business relationships with customers, suppliers and other counterparties.

X DISPUTE RESOLUTION

As a forum, Canada is well-suited to the adjudication of complex technology disputes. Parties are generally free to bring claims as they see fit, with frivolous suits discouraged by a costs regime that typically requires the losing party to pay a certain percentage of legal fees to the winning party.

Arbitration has emerged as a preferred forum for the adjudication of technology disputes in Canada, and is encouraged by Canadian courts and legislatures.[17] Canada is also home to specialised 'commercial list' courts, generally staffed by pragmatic, business-oriented commercial judges who adjudicate matters in real time where appropriate.

Canadian courts will generally enforce forum selection agreements and arbitration agreements in commercial contexts, and foreign judgments and arbitral awards are also generally enforceable in Canada, subject to overriding public policy concerns (e.g., fraud).

XI OUTLOOK

The outbreak of the covid-19 pandemic has resulted in a significant reduction in overall M&A activity in 2020 in contrast to 2019. For parties seeking to negotiate or enter into acquisition agreements and to complete transactions during this time, covid-19 presents numerous challenges, including:

a purchase price and valuation issues;
b additional due diligence;
c logistical issues pertaining to court, regulatory and shareholder approvals; and
d practical obstacles including post-closing integration of new entities.

17 To facilitate the use of arbitration, each province has enacted domestic and international arbitration legislation that permits defendants in court-initiated litigation to apply for a stay of proceedings on the basis of the parties having previously agreed to an arbitration agreement that addresses some or all of the matters before the court.

Notwithstanding the above-noted challenges, the need for technology has increased significantly, with the majority of businesses shifting to an online and work-from-home model. Despite the short-term challenges, there is a strong belief that the Canadian technology sector will continue to prosper due to favourable immigration policies, a skilled workforce, ample venture capital and supportive tax incentives.

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