THE TECHNOLOGY M&A REVIEW

SECOND EDITION

Editor
Michael J Kennedy

THE LAWREVIEWS

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Second Edition

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This article was first published in October 2021
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Published in the United Kingdom
by Law Business Research Ltd, London
Meridian House, 34–35 Farringdon Street, London, EC4A 4HL, UK
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Enquiries concerning editorial content should be directed
to the Publisher – clare.bolton@lbresearch.com

ISBN 978-1-83862-833-8

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following for their assistance throughout the preparation of this book:

BIRD & BIRD

ÇIFTÇI ATTORNEY PARTNERSHIP

CLEARY GOTTLIEB STEEN & HAMILTON LLC

CMS

GOODMANS LLP

HOGAN LOVELLS

PAUL HASTINGS LLP

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PREFACE

Welcome to the second annual *Technology M&A Review*. This addition to The Law Reviews 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 late 2019, well before covid took the reins.

I know I do not need to explain why 2020 was a different year than most. The first quarter of 2020 M&A activity was comparatively awful. Then the second quarter was consumed by trying to understand what covid meant, not only for the M&A legal market, but for each contributor to this book, 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 its latest edition.

And so we have an annual update review that keeps 30 June 2020 as its base, and that both distorts and understates the power and vibrancy of the technology industry over this unusual period. The book's contents show technology M&A's growth and march to ascendency 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, and it showed its resiliency and power even more so in the first half of 2021. Technology M&A, in terms of growth in value and numbers, continues the champion's jog around the track; the race is not even close.

Why? Growth 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 very quickly.

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 been 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' advances are thought of, consciously or unconsciously, as recipients of technology but not creators.

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. One of its unstated premises is that because of technology's importance, effective M&A technology lawyering necessarily involves and requires a broad set of legal skills across many practice areas; and that requirement will likely increase as governments

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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 be waged.

At least as of the time of this writing in September 2021, technology M&A in the US is robust, reflecting its advantage in a digital world. Despite any changes in regulation or monetary policy, compared to other sectors its prospects are, and will continue to be, relatively better.

Michael J Kennedy
Paul Hastings LLP
San Francisco
September 2021

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Chapter 4

CANADA

Richard Corley, Allan Goodman, Michelle Vigod and Jessica Bishop[1]

I OVERVIEW

Deals in the technology sector continue to represent a significant percentage of overall transaction activity in Canada. The technology sector represented 13 per cent of deal flow in 2020 and 23 per cent of deal flow in the first quarter of 2021.[2]

The Canadian 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 Public M&A transactions

Canada recorded US$36 billion in public M&A deal activity in 2020, with technology deals comprising roughly a 13 per cent share.[3] The Canadian technology sector has flourished in recent years, in part because of favourable immigration policies, a skilled workforce, ample venture capital and supportive tax incentives. Several notable technology M&A transactions were completed within the past two years, including three significant transactions noted below.

a On 21 February 2019, BlackBerry Limited (New York Stock Exchange (NYSE): BB; Toronto Stock Exchange (TSX): BB), a provider of security software and services to enterprises and governments, acquired Cylance, a privately-held artificial intelligence and cybersecurity company. The aggregate consideration paid by Blackberry was approximately US$1.4 billion.

b On 24 December 2019, OpenText (Nasdaq: OTEX; TSX: OTEX), a global leader in enterprise information management, acquired Carbonite, Inc. (Nasdaq: CARB), 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.

1 Richard Corley, Allan Goodman and Michelle Vigod are partners, and Jessica Bishop is a senior associate, at Goodmans LLP.

2 2020 PE Report and Q1 2021 PE Report, Canadian Venture Capital and Private Equity Association, https://www.cvca.ca/research-insight/market-reports/.

3 Bloomberg (2021), Industry breakdown for 2020, Bloomberg Finance LP terminal, accessed: 5 August 2021.

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c On 24 August 2020, Simply Green Home Services Ltd, a ventilating and air conditioning provide, acquired Dealnet Capital Corp (TSX VENTURE: DLS), a leading consumer finance engagement platform. The total purchase price was approximately C$176 million.

ii Private equity transactions

The Canadian Venture Capital Association reported a slight decrease in Canadian private equity M&A deal volume from 661 deals in 2019 to 643 deals in 2020, and a decrease in total deal value from C$19 billion in 2019 to C$14 billion in 2020.[4] Despite the decline in Canadian private equity M&A deal value during 2020, the technology sector accounted for the second largest proportion of private equity M&A deals in Canada; totaling over C$3.6 billion.[5] The most significant private equity deals in the technology sector included:

a On 27 February 2020, Stonepeak Infrastructure Partners, a private equity firm with over US$17 billion in investor commitments, acquired Xplornet Communications Inc, a leading provider of rural broadband services. The transaction was valued at US$2.67 billion.

b On 18 February 2021, Canada Pension Plan Investment Board, TPG Capital, Generation Investment Management, Alberta Investment Management Corp, Vestcor Inc and HG Capital announced the closing of their acquisition of Benevity Inc, a market leading provider of charitable donation management and grant-management platforms. The deal was valued at US$252 million.

The first quarter of 2021 displayed a modest rebound in private equity M&A with 177 deals valued at C$2.6 billion, a more than C$500 million increase from each of the previous three quarters in total deal value.[6] While private equity M&A showed a modest rebound at large, the technology sector had one of the greatest deal size totals with C$547 million.

III LEGAL AND REGULATORY FRAMEWORK

i 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 the target's board. While both structures can be used for 'friendly' or negotiated transactions, most are structured as arrangements as a result of the flexibility of the arrangement process.

An arrangement is a flexible statutory procedure that allows the buyer to acquire 100 per cent of the 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

4 Christiane Wherry et al, 'Private Equity Canadian Market Overview // 2020', Canadian Venture Capital and Private Equity Association, https://www.cvca.ca/files/reports/year-end-2020-canadian-vc-pe-market-overview/CVCA_PE_Q4_2020_FINAL_032421.pdf.

5 ibid.

6 ibid.

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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 the target's shareholders where the number of shares subject to the 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 the 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.

ii 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 the 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 the purchaser are issued as purchase price consideration.

IV KEY TRANSACTIONAL ISSUES

i Legal frameworks and deal structures

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 the target's voting shareholders. Shares held by the buyer and its joint actors count toward this approval. If the transaction is subject to Multilateral Instrument 61-101 Protection of Minority Security Holders in Special Transactions (MI 61-101) under applicable Canadian securities law, the transaction 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: (1) an interim order that confirms the process for obtaining shareholder approval and generally provides for shareholder dissent rights (accompanied by the right to be paid fair value for their shares); and (2) a final order that approves the arrangement if the court is satisfied the transaction is 'fair and reasonable' to the target's security holders.

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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.

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 the 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 the bid.

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.

The 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, the bidder 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 the 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.

Asset purchase versus share purchase

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

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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.

Fiduciary duties

Directors of Canadian corporations have a general fiduciary duty to manage or supervise the management of the business and affairs of the company and, in carrying out this mandate, must act honestly and in good faith with a view to the best interests of the 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 the company. Rather, when evaluating a potential sale of the company, Canadian directors are subject to the same general fiduciary duties described above and, if those duties are fulfilled, the business judgment rule will apply. As a result, Canadian directors have significant flexibility when negotiating a potential sale of the 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 the transaction is fair to the company's other stakeholders).

The business judgment 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 the 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.

ii 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: (1) the no-shop covenant; and (2) break fees.

No-shop covenant

The no-shop covenant is a popular mechanism implemented by purchasers, which requires the 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

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M&A transactions because 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 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 the board can exercise the 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 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 the transaction 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 the fee is often a reflection of the parties' relative bargaining power.

While there is 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 the 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 that 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 the

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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 the representations and warranties.

A material adverse effect definition is also regularly used as a condition to closing in the purchaser's favour. This clause typically permits the 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 because of the impact it can have on the value of certain representations and warranties and to the condition 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 carve-outs in the definition in the seller's favour. Common carve-outs are: (1) changes in applicable laws; (2) accepted industry-wide fluctuations or risks affecting the industry; (3) changes in general economic or political conditions; and (4) acts of war, terrorism and natural disasters. Given the significant impact that the covid-19 pandemic has had on businesses, the definition of material adverse effect has become the subject of significant attention. Whether or not the clause can be invoked during, or as a result of, the pandemic depends on the precise wording of each definition and it is a heavily negotiated issue based on the industry of the target business and the relative bargaining power of the parties.

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'. The pro-sandbagging provision preserves the purchaser's right to bring indemnification claims against the seller for breach of a representation, warranty or covenant, even if the purchaser knew about the breach before closing and proceeded with closing the transaction regardless. Conversely, sellers seek to include an anti-sandbagging provision, which limits the purchaser's ability to seek recourse on matters the purchaser knew about at closing. In Canada, purchase agreements are most often silent on sandbagging and, in contrast to certain US jurisdictions, there is no consistent or recent case law in Canada on when sandbagging may be permitted absent a specific provision.

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 if a representation or warranty is untrue or a covenant is breached. The purchaser will seek no cap or a high cap, whereas the seller will advocate for the lowest cap possible. Certain carve-outs are common where any liability stemming from a breach of a fundamental representation becomes subject to either an increased cap or no cap. The indemnity cap is typically between 25 per cent 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 these adjustments or indemnification claims made by the purchaser against the seller.

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Earn-out provisions

An earn-out provision is a tool where 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). Earn-outs have grown in popularity in recent years, predominantly because of a sellers' market and the ability it affords buyers and sellers to bridge gaps in valuation. Where an earn-out is implemented in a private target acquisition, the provision generally stipulates the financial targets or milestones that must be achieved to trigger payment and the time periods for these targets to be met.

iii Hostile transactions

Hostile transactions, where a direct offer is made to the shareholders of the target company without support of the target's board, are uncommon in Canada, especially in the technology sector. On 25 February 2016, the Canadian Securities Administrators published new takeover bid rules, intended to balance the bidding dynamics between hostile bidders and target boards. There have been very few hostile transactions in Canada since the changes were implemented.

iv Financing considerations

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 the 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 buyer's ability to use equity in purchasing the seller.

Levered transactions generally offer higher rates of return without large cash commitments from the purchaser's equity investors. However, investments in highly levered businesses are inherently riskier for equity holders considering that if the business goes bankrupt, they may not get their investment back. The debt-to-equity financing decision is particularly interesting given the covid-19 pandemic. With continued low interest rates resulting from the pandemic, potential buyers may continue to turn more towards debt financing when engaging in M&A deals in 2021 to the extent lenders are comfortable with the risk profile of the business in this new reality.

v Tax considerations / 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 (CRA) and the provinces are relevant to taxation in Canada.

The primary basis for income taxation in Canada is the 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.

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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 financial statement preparation.

vi Cross-border complications and solutions

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 the 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): (1) 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 (2) 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 above is adjusted on an annual basis.

The Commissioner will review each notification to determine if the 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 imports and exports of goods and technology from and to various destinations.

While not an export control, the Controlled Goods Program 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.

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Foreign investment

Canada generally welcomes investment by foreign businesses. However, Canada requires that any non-Canadian proposing to acquire an existing business in Canada or 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 Canadian 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 the 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 Canadian government, and obtain the approval of a Canadian 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 she or he determines the transaction is likely to be of 'net benefit to Canada'. This assessment is made based on the commitments that the foreign investor offers about how it intends to operate the 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 of Canada has issued guidelines concerning the factors the government may consider when making a determination.

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

V IP PROTECTION

Canada provides comprehensive protections of intellectual property rights. Canada is a party to the principal international intellectual property treaties. In 2020, Canada also harmonised certain elements of Canadian intellectual property 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, intellectual property 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

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Intellectual Property Office (CIPO) is the patent, trademark, industrial design and copyright administration body of Canada. There is also an internet domain (.ca) registrar for Canada, the Canadian Internet Registration Authority.

i 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 work (e.g., paintings, photographs, sculptures and architectural works) to control copying and other commercial exploitation of that 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 the work, except that copyright in works made in the course of employment belongs initially to the employer unless there is an agreement to the contrary.

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

ii 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 the application filing date is important, 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. These software inventions may be patentable if certain conditions are satisfied.

iii Trademarks

A trademark is a sign or combination of signs that distinguishes 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

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whether the 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, Nice Classification and Singapore Treaty, and made significant amendments to the Trademarks Act (Canada) which 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 countries.

iv 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 the 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 the 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 their 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 their employment will only pass to the 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 without cause, an employee will generally be entitled to reasonable notice of termination at common law, unless the employee has an enforceable contract of employment that limits their notice of termination to the prescribed statutory minimum under the applicable employment standards legislation or to a contractually agreed upon higher amount or formula. Given recent judicial decisions in Ontario, many contractual termination rights have been rendered unenforceable.[7] In order for an employer to ensure that a severance limitation is enforceable, very specific language is required. 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 availability of similar employment and reasonable length of time needed to find comparable employment in making a determination as to what constitutes reasonable notice and the high end of the range is generally 24 months' total compensation. Recent judicial decisions in Canada have also resulted in the unenforceability of many forfeiture provisions that purport to limit an employee's post-termination entitlement to bonuses, equity grants, equity vesting or other

7 *Waksdale v. Swegon North America Inc.*, 2020 ONCA 391.

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incentives and specific language is required to waive common law rights to damages for any bonus, equity or other incentives to which an employee would otherwise have been entitled during a reasonable notice period if the employee's employment had not been terminated.

VII DATA PROTECTION

Canada has federal and provincial/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 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. 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 meaningful, informed consent of the 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 the collection, use or disclosure is for the purposes of establishing, managing or terminating an employment relationship. However, the organisation must first notify the individual that it will be collecting, using or disclosing this employee personal information 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 a prospective or completed business transaction, if this personal information is necessary: (1) to determine whether to proceed with and complete the transaction; and (2) for carrying on the business or activity that is the object of the transaction. The Quebec statute does not contain a similar exception.

On 12 June 2020, the Quebec government introduced Bill 64, An Act to Modernise Legislative Provisions as Regards the Protection of Personal Information, which introduced significant changes to the two main privacy laws in Quebec. While Bill 64 has not yet been passed at the time of writing, Bill 64 may proceed with review in September 2021, and it

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could be passed by December 2021. The Canadian government also introduced legislation on 17 November 2020, Bill C-11, the Digital Charter Implementation Act, 2020, to modernise and significantly reform PIPEDA; however, Bill C-11 has not been passed and there is no clear timeline for the adoption of the legislation at the time of writing.

VIII SUBSIDIES

The Canadian 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 certain federal programmes include:

a Business Development Bank of Canada (BDC): provides services to technology startups;

b Innovation, Science and Economic Development Canada (ISED): 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 start-ups; and

c National Research Council Industrial Research Assistance Program (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 certain provincial programmes include:

a Ontario Capital Growth Corporation (OCGC): 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 the BC Tech Fund: funding for companies in information and communications technology, digital media, cleantech and life sciences or healthcare; and

d Nova Scotia's Innovacorp: invests alone or in collaboration with government or private sector investors within the early-stage 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: (1) an income tax deduction; (2) an investment tax credit; and (3) in some circumstances, a refund. The programme provides over 20,000 claimants with more than C$3 billion in tax incentives annually.

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IX DUE DILIGENCE

Due diligence typically focuses on the business assets and attributes most valuable to the buyer. It will be important to assess the quality, validity and ownership of the intellectual property in the technology developed by the business, identify and document key know-how, identify and secure personnel who are key to the technology's ongoing development, and understand and secure the 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.[8] 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

During the covid-19 pandemic, for parties seeking to negotiate, enter into acquisition agreements and complete transactions during this time, covid-19 has presented numerous challenges, including purchase price and valuation issues, additional due diligence, logistical issues pertaining to court, regulatory and shareholder approvals and practical obstacles including post-closing integration of new entities. 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, and with the growth of new areas that can support work-from-home models, such as 5G operating systems, there is even more reason to believe that the tech industry will continue its growth. Despite the short-term challenges, there is a strong belief that the Canadian technology sector will continue to prosper as a result of favourable immigration policies, a skilled workforce, ample venture capital and supportive tax incentives.

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8 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.

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Appendix 1

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Richard Corley is a partner in a business law group and leads the cleantech and outsourcing groups at Goodmans. His practice is transaction-based with a particular focus on strategically valuable technologies. Richard has over 25 years of experience advising clients on complex outsourcing transactions, technology M&A, joint ventures, cleantech and other technology-related matters. He assists companies in the financial services, manufacturing, clean energy, public, computing, telecommunications, innovation and other sectors that are involved in the development, acquisition and use of technology. Richard is recognised as a leading lawyer in numerous publications including *Chambers Canada*, *Chambers Global*, *The Canadian Legal Lexpert Directory*, *Best Lawyers in Canada*, *Expert Guides: Best of the Best* and *The Legal 500: Canada*. Richard is a member of the board of the Building Energy Innovators Council, a founding director of the Ontario Clean Technology Association, a founding director of the Canadian Institute for Exponential Growth (which organises the SingularityU Canada summits), a director of the Canadian Technology Law Association, and a director and faculty of the Centre for Outsourcing Research and Education. He was admitted to the Ontario Bar in 1992.

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Allan Goodman is a partner in a business law group, and co-heads the technology group at Goodmans. His practice focuses on corporate finance, mergers and acquisitions, corporate governance and regulatory compliance matters. Allan acts for a broad range of issuers and underwriters on corporate finance transactions, including public offerings and private placements. Allan also provides advice to boards of directors and special committees with respect to governance and compliance matters. Allan leads the firm's emerging business initiative in its role as 'legal counsel in residence' at the DMZ at Ryerson University, one of Canada's largest business incubators for emerging tech startups. Allan is recognised by numerous publications including *IFLR1000*, *The Canadian Legal Lexpert Directory*, *Best Lawyers in Canada* and *The Legal 500: Canada*. He was admitted to the Ontario Bar in 1993.

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Jessica Bishop is a senior associate in a business law group at Goodmans. Her practice focuses on corporate and commercial law with a focus on complex commercial technology transactions. Jessica represents financial institutions, insurance companies, technology service providers, pension funds, government agencies and companies in the asset management, healthcare, energy, securities, and other sectors that are involved in the development, acquisition and use of technology. Jessica has extensive experience advising clients on technology procurement, outsourcing, cloud computing, payment systems, licensing, fintech, digital and e-commerce solutions, software development and systems implementation, data processing and privacy compliance. Jessica is recognised as an Associate to Watch in *Chambers Canada* and also a Rising Star by *The Legal 500: Canada*. She was admitted to the Ontario Bar in 2013.

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ISBN 978-1-83862-833-8

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