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SPECIAL EDITION: FINANCE AND M&A 2020



DEALING WITH COMPLEXITY

How private equity and stakeholder engagement are shaking up corporate Canada

Denise Bright, Bennett Jones LLP;
John-Paul Bogden, Blake Cassels & Graydon LLP;
Grant Zawalsky, Burnet Duckworth & Palmer LLP



TOP 10 DEALS OF 2019

Demonstrating Canadian legal and business talent at the top of its game

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LEXPERT'S TOP 10 DEALS OF 2019
The Top Deals of 2019 demonstrate Canadian legal and business talent at the top of its game

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COVER PHOTOGRAPHY:
RÖTH AND RAMBERG



Leading corporate lawyers tackle complexity

Welcome to the *Lexpert* Special Edition on Finance and M&A. In this issue, alongside the biographical information about *Lexpert*-ranked lawyers, we bring you topical articles including our Top 10 Deals of 2019 (p. 22).

In picking the top deals, the quantum of the deal is important but not determinative. It is the complexity and hurdles that were overcome that truly reflect the value of the specialized lawyers who acted on these deals. In fact, many of these deals are years in the making and involve various stakeholders across multiple jurisdictions. For example, the C\$1.9-billion Wataynikaneyap transmission project in northwestern Ontario was a decade in the making, and the project is majority-owned by a holding company consisting of 24 First Nations. Hasbro's acquisition of Entertainment One involved assets and regulatory approvals from all over the world.

Other deals are one step in a larger story. After Newmont completed its acquisition of Goldcorp, Newmont Goldcorp and Barrick Gold combined their mining properties in Nevada, creating the world's largest gold-producing complex in a deal Barrick Gold president and CEO Mark Bristow said was 20 years in the making. Pembina's acquisition of Kinder Morgan continued the trend of consolidation in the Canadian oilsands.

And much of the complexity faced by corporate lawyers can be evident in not just individual deals but in the wider trends these lawyers see. Shareholder engagement, environmental, social and governance issues and the oversight of corporate conduct are major concerns that boards will have to deal with in 2020 (p. 14). Canada is an attractive place for private equity, and the public markets are not getting the same attention from investors. That means that the private equity market is also highly competitive, and there are very few proprietary deals where a fund would find a business and buy it without having competing bids (p. 4).

The lawyers involved in these deals face these complexities head on and work tirelessly to get the deal done. They bring expertise and flexibility, providing value in a complex business environment that is never dull.

Tim Wilbur, Editor-in-Chief

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THE RISE OF PRIVATE EQUITY

PRIVATE EQUITY HAS A LOT OF “DRY POWDER” TO SPEND, AND IT IS AN INCREASINGLY ATTRACTIVE ALTERNATIVE TO THE PUBLIC MARKET, BUT IS THE SUN SETTING ON IT SOUTH OF THE BORDER?

BY ELIZABETH RAYMER

IN A HIGHLY competitive market — but with more money in the system than ever — private equity activity has been booming, especially as it's more difficult to get the same valuations in the public markets. Lawyers are highly involved in these private equity deals, with an estimated 400 lawyers in Toronto alone supporting this market.

Family participation and the formation of more formal family offices is also increasing. And both family offices and private equity funds are giving public markets a run for their money.

“What we're seeing . . . today is that the private equity firms are growing — there's more of them than there have been — and they have a lot of money,” says Denise Bright, a partner in Bennett Jones LLP's Calgary office with a banking, financial transactions and securities practice.

“The public markets are not getting the same attention these days from the investors,” Bright says, especially the institutional ones such as pension funds and university charitable trusts, “as are the private equity funds.”

The private equity market is also “highly competitive compared to even five to 10 years ago,” says John-Paul Bogden of Blake Cassels & Graydon LLP's Vancouver office, whose practice focuses on M&A and private equity





MID-MARKET SECTOR MOST ACTIVE

The mid-market is the most active sector now.
In the last recorded quarter, the mid-market in Canada represented:

91
PER CENT OF DEAL
ACTIVITY



19
PER CENT OF DEAL
VALUE



transactions. “There are very, very few proprietary deals where a fund would find a business and buy it without having competing bids from other parties. That used to happen occasionally; it’s very rare that it happens now.”

Even the smallest deals have a sell-side or other type of financial agent involved who is helping the PE fund with an auction or sales process, he says. “So, the days of just finding a diamond in the rough seem to be over. That’s across all [size] brackets.”

‘Dry powder’ and the merger market

Part of the reason for the boom in private equity investing may be the money out there to spend. There’s currently an estimated \$2 trillion of “dry powder” (capital looking for deals) in the PE market, says Curtis Cusinato of Bennett Jones LLP in Toronto, who practises corporate and securities law with an emphasis on cross-border M&A, private equity and capital markets transactions.

“I think private equity will continue to be very active in this upcoming year, and certainly that activity will keep pressure on pricing,” Cusinato says.

“There is still lots of dry powder,” says Samantha Horn, a partner in the mergers and acquisitions and private equity groups at Stikeman Elliott LLP in Toronto. At the halfway point of 2018, she says, the merger market had reported that the global value of M&A was US\$1.8 trillion, based on more than 8,000 transactions, and about 1,500 of those transactions were worth about \$245.1 billion.

There are higher transaction multiples on M&A deals today “because there’s a lot more money chasing deals than there are people selling,” says Alan Litwack, a partner at Dickinson Wright LLP in Toronto.

Private equity investors also find Canadian companies attractive, says Litwack. That’s because of Canada’s strong domestic market, its reliable legal system, its attractive foreign exchange and lending from Canadian banks and its desirable industrial sectors such as manufacturing and food production.

A shift from public markets to private equity ...

With a few high-profile public deals either not going forward or struggling in the past year, such as those of GFL Environmental Inc. and WeWork, and public markets performing in an “underwhelming” manner, more deals have shifted to private equity funds, says Horn. Deterrents to going public include a lack of access to capital and the expense of launching an IPO, with the regulatory oversight and compliance that entails, she says. “People tend to want to — if they can access capital — stay private longer.”

Lower, mid-market companies are not able to go public as they are too small, and public markets can be lerier of debt and less tolerant of risk, Horn adds.

Particularly in the U.S., “it’s getting harder to get valuations” in the public market, says Litwack, noting that Uber’s market valuation is down “billions,” and Lyft’s as well. “Invest-



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“The nice thing about the private equity guys coming in is they can be more flexible than the public markets can be.”

Denise Bright
BENNETT JONES LLP

ors are far more critical in their analysis of companies doing IPOs” now, he says. And, it’s “far cheaper to do a deal with a private equity fund or another buyer than it is to do an IPO,” including in underwriting fees.

Some perspective sellers will follow a dual track process; at the same time, they’re negotiating with prospective buyers, such as private equity funds or “synergistic” buyers, they will also be preparing for an IPO. “And they’ll see which one is going to yield the best results,” says Litwack. If a PE fund or a synergistic buyer really wants a company, they may make a bully bid to get it “without you going to the IPO market and figuring out what you could get there.”

Bright sees valuations in the private equity market now that aren’t generally seen in the public market. Citing Visa’s announced acquisition of financial technology startup Plaid in

January, she notes that the end-of-2019 valuation of Plaid was almost two times what it was at the end of 2018.

Some PE firms, such as Blackstone Group LP, have grown to the extent that they’ve gone public. “The nice thing about private equity guys coming in is they can be more flexible than the public markets can be,” Bright says. “Sometimes, you’ll see debt and equity or an equity line of credit; the private equity company will offer a large loan with specifications.”

... and to smaller markets, industrials, resources

The mid-market is the most active sector now, says Horn, representing 91 per cent of deal activity and 19 per cent of deal value in the last recorded quarter, and making it a good place for private equity to look. Cross-border

Pitblado Law welcomes Donald J. MacDonald

Don has returned to private practice after 25 years with one of Canada’s leading financial services firms where he held senior legal roles, including Senior Vice President, General Counsel, Secretary, and Chief Compliance Officer.

While a primary focus was on securities law matters, his roles encompassed a multitude of areas including corporate and commercial, litigation, M&A, and working on behalf of the firm with financial services regulators throughout Canada. He also provided strategic advice on such things as corporate initiatives and enterprise risk

management. As a senior lawyer for a public company, the scope of Don’s legal advice included corporate governance, TSX rules, public disclosure considerations, related party transactions, and insider reporting.

Whether you would like assistance with corporate or securities law matters specific to Manitoba, or would like to avail yourself of Don’s expertise and experience for any legal issue, Don welcomes your contact.

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“We are seeing higher [transaction] multiples today because there’s a lot more money chasing deals than there are people selling.”

Alan Litwack
DICKINSON WRIGHT LLP

.....

deals are still strong, notably with the United States, as is the industrial sector.

As for rising stars like cannabis, artificial intelligence and technologies and crypto-currencies, “a lot of that attractiveness to those segments has certainly decreased,” says Cusinato.

In Canadian capital markets, the two traditional resource sectors are mining and oil and gas, and while the market in those sectors has been less robust in recent years, Cusinato says he has “a more positive outlook going into 2020” for alternative minerals, such as lithium, and for rare earth. He also sees a favourable forecast for real estate/REITs.

The rise of family offices and institutional investors

The family office — meaning a devoted investment office for a very wealthy family —

has also come into its own. In family offices, a family will hire investment professionals to run their investments, ranging from a single person to fully staffed offices with formal boards of directors and investment managers.

Family offices are now choosing to put some of their wealth to work in funds that invest in private equity and venture capital, says Horn, and they are participating directly in mid-market M&A activity, she says. That these families have made their money owning and running successful businesses is “a good story for the business owner that’s trying to sell” a business, she adds, as they’re looking for a partner with experience. “Sometimes, a business owner would prefer to work with another business owner.”

Family offices are also looking “for more of a Warren Buffett type of investment,” says Liwack: strong cash flow and continuing in-

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“It’s expensive to go public. There’s oversight. There’s a lot of compliance. People tend to want to — if they can access capital — stay private longer.”

Samantha Horn
STIKEMAN ELLIOTT LLP

come for generations. And for the seller who wants to stay in the game after the sale of their company, and a patient investor with a time-frame of three to seven years, they are “better off with a family office buying” their business.

For entrepreneurs who find the next generation of their family is not interested in taking over the business, an exit through private equity may be the answer. But many successful “boomers” are still sitting on their companies, Litwack says, owing to the revenue those companies still generate. After a business is sold, “What can you invest in that gives you that \$2 million” per year?

And the growth and reach of Canadian pension funds has expanded on a global basis. The Ontario Teachers’ Pension Plan board has offices in New York and London, Bogden notes, and the Canada Pension Plan Investment Board has set up an office in the Bay

Area. Boots on the ground and higher visibility assist in assessing and participating in the higher deal activity in those areas, he says.

Uncle Sam’s sunset?

In the past year or so, Bogden says, “some [PE] funds are finding the exit process harder” as new buyers drive harder bargains. As well, each of the four leading Democratic candidates in the U.S. election have pledged to eliminate beneficial tax treatment for capital gains among top earners, and private equity investors are talking about locking in profits under the current taxation scheme.

“You’ll see, perhaps in response to that, the large funds diversifying,” he says, into infrastructure, public funds and non-listed funds.

In the United States, at least, “there’s a sense that the private equity party has to end sometime, and it’s been an awfully good run.” ■

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MORE STAKEHOLDERS, MORE SCRUTINY

CORPORATE DIRECTORS MUST CONSIDER BOTH MULTIPLE STAKEHOLDERS AND MULTIPLE CHALLENGES: FROM ACTIVIST SHAREHOLDERS TO ENVIRONMENTAL, SOCIAL AND GOVERNANCE ISSUES TO THE OVERSIGHT OF CORPORATE CONDUCT IN THE WAKE OF #METOO

IN EARLY JANUARY, Coastal GasLink contractors hired to construct a natural-gas pipeline in central British Columbia were forced to vacate the worksite near Houston, B.C. after an “eviction notice” was issued by hereditary chiefs of the Wet’suwet’en First Nation and felled trees made the road impassable.

Coastal GasLink had engaged in community consultations, including with First Nations, since 2012, and had signed agreements with all 20 elected First Nations councils along the pipeline’s route. On Dec. 31, 2019, the company was granted an injunction by a B.C. Supreme Court judge against protestors who had blocked access to the project inside their territory; yet its work was halted regardless.

This is an example of the kind of issue with which Canadian corporations and their boards of directors must increasingly



PAY RATIO DISCLOSURE GAINS STEAM

United States: Publicly traded companies have been required by the Securities Exchange Commission since 2018 to disclose the ratio of their median worker’s compensation as compared to their top executive.

United Kingdom: A rule was adopted that will require publication of CEO-worker pay ratios for the 2019 year during the 2020 annual meeting season.

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“THE BEST BOARDS OUT THERE ARE ROUTINELY ... SITTING DOWN WITH THE TOP SHAREHOLDERS AND LISTENING MORE THAN TALKING.”

Patricia Olasker
DAVIES WARD PHILLIPS
& VINEBERG LLP



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Cornell Wright, who chairs Torys LLP's corporate department from his office in Toronto, points to a "variety of competing pressures" facing directors and their corporations today.

"You have increasingly vocal and activist shareholders who are, in many cases, focused on short-term shareholder value maximization. And, at the same time, you have a variety of other stakeholder groups who are focused on ESG, are focused on issues of . . . inequality as it relates to employees," says Wright.

"You have a range of competing concerns, and directors in companies find themselves in difficult positions," he says. "And you see that play out in the context of a range of issues, both transactions, but also of general concern."

ACTIVIST INVESTORS

Since 2008, when the Supreme Court of Canada issued its decision in *BCE Inc. v. 1976 Debentureholders*, boards of directors must be mindful of the interests of all stakeholders, and not only shareholders.

However, although there is no "shareholder primacy over other stakeholders," says Alex Moore, an M&A lawyer and partner at Blake Cassels &

Graydon LLP in Toronto, whose practice includes corporate governance, "the reality is that directors are annually accountable to the shareholders for the job that they're doing; if shareholders don't like the job that the directors are doing, they can withhold their votes from those directors to force a resignation" if the company is performing poorly, "or the shareholders, if it's an activist situation, can even propose their own directors for election.

"Ultimately, it's the shareholders who make the decision on board composition."

Moore says a trend among corporate directors in the past five or so years is a heightened awareness of the potential for activism, as well as boards being "receptive to engaging in a constructive way with shareholders."

At the same time, says Wright, a board must ask itself if it is well served relying only on the activist investors' perspective or whether it should seek outside advice from financial professionals and others.

In an activist fight, "the board is meant to be leading," Wright says. "They need to make sure they're equipped with the thinking they need," independent of internal management.

SHAREHOLDER ENGAGEMENT

The "big sea change in the boardroom" in the past five to 10 years has been the extent of engagement by shareholders, says Patricia Olasker, a partner at Davies Ward Phillips & Vineberg LLP in Toronto, whose corporate law practice includes shareholder activism. In fact, she says, "What we are most frequently asked to advise boards on is how to deal with that situation."

Today, this engagement is less with aggressive activists demanding changes, but it takes the form of "ever-present input into decision-making by sophisticated institutional shareholders that have large stakes in the business," she says. Boards are having to engage with their shareholders routinely, not just when there's a crisis.

The best boards out there will routinely "sit down with the top shareholders and listen more than talk," she says. "It's engaging the shareholders to get their view on issues."

More companies also provide "a more transparent guidebook" for shareholders, allowing the board and management to provide their perspective to shareholders, says Moore.

About half of TSX-listed companies have voluntarily moved to say on pay for shareholders, meaning shareholder input into what executives earn, he says. "So, we may see increasing adoption" in larger companies, he says.

Pay ratio disclosure — i.e., disclosing the difference in salary between executives and average workers in a company — has gained popularity in the United States. The Securities Exchange Commission has adopted pay ratio disclosure for publicly traded companies, and the first disclosures were made in 2018, says Moore.

The SEC ended up adopting flexible rules

"THERE ARE MIXED SIGNALS ABOUT WHAT LIES AHEAD [ECONOMICALLY], AND . . . LOTS OF BOARDS ARE MAKING SURE THAT THE COMPANY IS PREPARED FOR . . . A DIFFERENT CLIMATE."

Cornell Wright TORYS LLP

deal, and it's one of many that must be considered in an era of multiple stakeholders, as well as increased scrutiny and expectations.

"You wouldn't have seen this [issue arise] even five years ago," says Grant Zawalsky, managing partner of Burnet Duckworth Palmer LLP in Calgary, who works largely in the energy sector, including in corporate governance and shareholder activism. "Five years ago, you would see general protests, but they weren't targeted against specific projects," he adds.

"I think that . . . shareholder engagement, ESG [environmental, social and governance] and oversight of corporate conduct are three very big topics that boards will have to deal with in 2020."



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that give companies a fair bit of discretion in how they determine the median worker, Moore says. And the U.K. has adopted a rule that will require publication of CEO-worker pay ratios for the 2019 year during the 2020 annual meeting season. Still, he adds, “I haven’t seen in my own practice a widespread push for that sort of global transparency” on pay ratio disclosure, for which there are yet no such requirements in Canada.

ENVIRONMENTAL, SOCIAL AND GOVERNANCE

Although Warren Buffet may take the view that companies shouldn’t invest their shareholders’ cash to social causes and should focus instead on what would most benefit those shareholders, many investors are nonetheless focused today on ESG principles, says Torys’ Wright.

“It’s a difficult dynamic,” Wright says, “because . . . it’s hard to argue with initiatives that would support long-term sustainability” and those impacts on various employee and stakeholder groups. But “it comes down to the board’s responsibility to think of the long-term best interests of the company; it’s not sustainability in itself. What companies are focused on is ‘what’s our plan?’”

Who decides which First Nations individuals or groups should have authority to

approve resource projects and more must ultimately be dealt with by the Supreme Court of Canada, says Zawalsky. He calls the Coastal GasLink situation “very interesting from a legal point of view,” because the group protesting the pipeline project are hereditary chiefs and not elected band council members; i.e., they are chiefs by blood lineage rather than election.

“TC Energy has agreements with all of the First Nations councils on its route,” he says. “The issue is who properly speaks for First Nations? Who has governance over unsundered rights of First Nations? . . . Who do you [especially energy companies] need to consult with . . . depending on the issue?”

OVERSIGHT OF CORPORATE CONDUCT

In the age of #MeToo and heightened scrutiny of workplace social conduct, “oversight of corporate conduct is becoming a big issue,” says Zawalsky.

More generally, there’s an expectation that a board will supervise conduct in the C-suite, whether that’s regulatory compliance or sexual misconduct, says Olasker. “There’s an expectation that the board will be accountable, certainly reputationally even if not legally.” In regulated sectors especially, such as cannabis, boards need to be informed in order to make appropriate inquiries, she says.



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“SHAREHOLDER ENGAGEMENT, [ENVIRONMENTAL, SOCIAL AND GOVERNANCE] AND OVERSIGHT OF CORPORATE CONDUCT ARE THREE VERY BIG TOPICS THAT BOARDS WILL HAVE TO DEAL WITH IN 2020.”

Grant Zawalsky BURNET DUCKWORTH PALMER LLP

One high-profile example of the consequences of a workplace romantic relationship between employees of disparate levels of authority was when McDonald’s CEO Steve Easterbrook, credited with modernizing the corporation and nearly doubling its share price during his tenure, lost his job

in November for dating a subordinate, in violation of company policy.

“Has the pendulum swung so far that boards are overreacting, or have social mores changed so much” that any dating in the workplace, even consensual, is considered inappropriate? Olasker asks. “I think most boards will land on the side of taking a harsher stance on the conduct rather than risk being criticized for laxity in the public view.”

BOARD INDEPENDENCE AND ADVICE

A committee of independent directors should be established at the first sign of

trouble, says Olasker, and securities regulators expect it, she notes, citing the Ontario Securities Commission’s decision on the Catalyst Group’s and Baker bids to purchase the Hudson’s Bay Company. HBC chairman Richard Baker had led a bid on behalf of a group of majority shareholders to buy the company, but the Catalyst Group Inc., a private equity firm also bidding, complained of the timing and quality of the bidding process, notably that HBC had not properly informed shareholders of important details of the bid.

In December, the OSC decided to delay the shareholder vote, and it will require a great deal of additional information now, says Olasker.

“It was a really powerful reminder to boards that they’ve got to do more than go through the motions in conflict transactions,” she says. “They’ve really got to have a robust process.”

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LEXPERT'S TOP 10 DEALS OF 2019

> **THE TOP DEALS OF 2019,**
COMPILED BY **TIM WILBUR**
AND **AIDAN MACNAB,**
DEMONSTRATE CANADIAN
LEGAL AND BUSINESS
TALENT AT THE TOP
OF ITS GAME

THE YEAR 2019 saw some blockbuster deals. Our Top 10 list touches on trends in mining, cannabis, entertainment, IPOs, the oilpatch and key developments in Indigenous ownership, shareholder activism, REITs, the airline industry and for Brookfield's extensive portfolio.

We compiled this list based on extensive feedback from *Lexpert*-ranked lawyers, and the competition to make the final list was fierce. The quantum of the deal is important, but not the governing factor. The deal must also stand for more than itself, by representing a trend, illustrating an aspect of

this year's economic climate or by being a portent of things to come.

As we have done in the past, we included several honourable mentions, some of which were related to a winning deal and placed with that deal.

Unlike past years, though, we have not declared a "Deal of the Year." That will be announced at our inaugural Canadian Law Awards on May 7 in Toronto. For more information about those awards, visit lawawards.ca.

In the meantime, we present to you the Top 10 Deals of 2019.

HONOURABLE MENTIONS

DIGITAL COLONY COMPLETES \$720M PURCHASE OF COGECO PEER 1

In a deal closed May 1, the global investment firm Digital Colony bought colocation and network connectivity provider Cogeco Peer 1 for \$720 million. The deal creates a standalone business under a new brand. Cogeco Peer 1 had a portfolio of more than 3,300 kilometres of owned, dense metro fibre in the Greater Toronto Area and Montreal and data centres elsewhere in North America and Europe.

A colocation centre rents computing hardware, other equipment and digital data storage to customers. It is also known as a carrier hotel.

The year 2019 was a growth year for Digital Colony. After the Cogeco Peer purchase, the company acquired Beanfield Technologies, the independent bandwidth infrastructure provider serving the enterprise, carrier and multi-dwelling unit markets in Toronto and Montreal through its fibre network.

Canadian law firm involvement

- > **Stikeman Elliott LLP** represented Cogeco Communications Inc.
- > **Miller Thomson LLP** represented Digital Colony
- > **McCarthy Tétrault LLP** represented lenders, which were led by CIBC

BC PARTNERS TAKES MAJORITY STAKE IN MONTREAL SECURITY GIANT GARDAWORLD IN DEAL WORTH \$5.2 BILLION

In October, private equity firm BC Partners completed a \$5.2-billion recapitalization of GardaWorld, taking a 51-per-cent common equity interest in the company. GardaWorld supplies armoured trucks and security guards to financial institutions, governments and other clients. BC Partners bought its share of the company from Rhône Group.

The other 49 per cent of GardaWorld is held by CEO Stephan Crétier and other

members of the company's management team. Crétier founded the company in 1995.

Canadian law firm involvement

- > **Stikeman Elliott LLP** represented GardaWorld
- > **McCarthy Tétrault LLP** represented Rhône Group, a seller
- > **Osler Hoskin & Harcourt LLP** represented BC partners

NOVACAP AND OTHER SHAREHOLDERS SELL KNOWLTON DEVELOPMENT CORPORATION

Cornell Capital LLC, a private investment firm based in New York and Hong Kong, bought all issued and outstanding shares of Knowlton Development Corporation from Novacap, the Canadian private equity firm. As part of the transaction, existing shareholders Caisse de dépôt, Investissement Québec and certain members of management reinvested into the company.

An announcement from Novacap said the transaction involved major complexity, including cross-border issues, regulatory matters including competition and antitrust compliance, as well as "significant corporate restructuring."

Knowlton provides product innovation, research support and other services to beauty, health and personal care brands.

Canadian law firm involvement

- > **Stikeman Elliott LLP** represented Cornell Capital LLC, a partner with Knowlton Development Corporation
- > **McCarthy Tétrault LLP** represented members of the senior executive management team of Knowlton Development Corporation
- > **Davies Ward Phillips & Vineberg LLP** represented Caisse de dépôt et placement du Québec
- > **Fasken Martineau DuMoulin LLP** represented Novacap

SNC-LAVALIN GROUP INC. SELLS 10.01-PER-CENT INTEREST IN 407 INTERNATIONAL INC. TO ENTITY CONTROLLED BY CANADA PENSION PLAN INVESTMENT BOARD FOR AGGREGATE CONSIDERATION OF UP TO \$3.25 BILLION, AFTER CPPIB EXERCISED RIGHTS OF FIRST REFUSAL ON SNC-LAVALIN'S PROPOSED SALE TO OMERS

In August, a company controlled by the CPPIB acquired a 10.01-per-cent equity stake in 407 International Inc. Under the agreement, CPPIB paid \$3 billion at close and will pay another \$250 million over a decade, contingent on the performance of the toll highway meeting certain financial targets.

SNC-Lavalin Group was ready to sell the 10.01 per cent of the Greater Toronto Area toll highway to the pension plan OMERS. The Canada Pension Plan Investment Board, which owns another 40 per cent of the 407, exercised its right of first refusal. Another major shareholder, the Spanish company Cintra Global S.E., had also tried to exercise its right of first refusal, but SNC disputed the validity of Cintra's claim, saying Cintra waived the right.

Canadian law firm involvement

- > **Norton Rose Fulbright Canada LLP** represented SNC-Lavalin
- > **Stikeman Elliott LLP** represented Canada Pension Plan Investment Board
- > **McCarthy Tétrault LLP** represented OMERS, a bidder



AIRLINES > WINNER



AIR CANADA ACQUIRES AIMIA'S AEROPLAN LOYALTY BUSINESS FOR \$2.4 BILLION

IN A MOVE that came amid general consolidation in the industry, last January, a consortium consisting of Air Canada, TD Bank, CIBC and Visa Canada Corp. completed the purchase of Aimia Canada Inc., which owned and operated the Aeroplan Loyalty business. The acquisition-hungry Air Canada is also pursuing the purchase of Air Transat, and investment manager Onex Corporation recently acquired WestJet.

The Aimia/Aeroplan transaction is one of the few acquisitions of a loyalty-points business, one lawyer on the deal told *Lexpert*. As it is typically difficult to quantify the value of loyalty program points, there were questions about how Air Canada would treat the liabil-

ity of outstanding Aeroplan points. But Air Canada will launch its own loyalty program in 2020, with Aeroplan members' points honoured on a one-to-one basis. Aeroplan is among the most successful frequent flyer loyalty programs in the world, with more than five million members.

Another feature of the deal was the banks and credit card companies involved showed the long-term value Aeroplan held to them by funding the cost of the acquisition and signing commercial agreements for future participation in Air Canada's loyalty program, the lawyer said.

The final aggregate purchase price for the acquisition consisted of between \$450

million and \$550 million in cash plus \$47 million in cash for pre-closing adjustments. The pre-closing adjustments relate to lower net liabilities assumed than projected. In addition, approximately \$1.9 billion in liabilities were assumed by Air Canada as part of the transaction.

Canadian law firm involvement

- > **Borden Ladner Gervais LLP** represented Mittleman – majority Aimia shareholder
- > **Norton Rose Fulbright Canada LLP** represented Aimia and Aimia Canada
- > **McCarthy Tétrault LLP** represented CIBC, a consortium member
- > **Fasken Martineau DuMoulin LLP** represented Air Canada
- > **Miller Thomson LLP** represented Visa Canada
- > **Torys LLP** represented the consortium
- > **Osler Hoskin & Harcourt LLP** represented TD Bank
- > **Stikeman Elliott LLP** represented Aimia Inc.

HONOURABLE MENTION

ONEX CORPORATION TAKES WESTJET PRIVATE FOR \$5 BILLION

In a stand-out private equity deal and another massive acquisition of an airline, Onex Corporation took ownership of WestJet Airlines Ltd. Onex — the investment manager with \$38 billion in assets under management — paid \$5 billion for the airline, at \$31 per share. WestJet is now a privately held company.

Canadian law firm involvement

- > **Goodmans LLP** represented Onex
- > **Norton Rose Fulbright Canada LLP** represented the special committee of the board of directors of WestJet Airlines Ltd.
- > **Dentons Canada LLP** represented the WestJet Executive
- > **DLA Piper (Canada) LLP** represented Onex
- > **Blake Cassels & Graydon LLP** represented WestJet

BROOKFIELD'S BIG BETS > WINNER



BROOKFIELD BUSINESS PARTNERS ACQUIRES GENWORTH MI CANADA INC. FOR \$2.4 BILLION

THIS DEAL BETWEEN the global asset manager Brookfield and Canada's largest private sector residential mortgage insurer was unique in how it addressed regulatory hurdles Genworth had trouble clearing in another transaction, a lawyer on the deal told *Lexpert*.

In 2016, Genworth Financial Inc. had agreed to merge with China Oceanwide Holdings Group. Competition commissioner and finance minister approvals were still outstanding, and with the Canadians jailed in China, the Huawei executive Meng Wanzhou's pending extradition and the 2019 federal election, the forecast for the deal was bleak. There was also the issue of data privacy, as the mortgage insurer held personal information on Canadians. Brookfield's purchase allowed Genworth to close the Oceanwide transaction and the company — known to Canadian regulators — would be able to expedite the regulatory approval process. Also, Brookfield had no business in

competition with Genworth, which eliminated any anti-trust concerns and Brookfield's healthy level of capital would make the finance minister happy, who sees that factor as imperative when assessing the acquisition of financial institutions.

Brookfield moved quickly and made the all-cash purchase of \$2.4 billion, at \$48.86 per share.

Canadian law firm involvement

- > **Goodmans LLP** represented the special committee to Genworth
- > **Stikeman Elliott LLP** represented China Oceanwide Group
- > **Torys LLP** represented Brookfield
- > **McCarthy Tétrault LLP** represented financial advisors TD, Scotia, RBC, BMO, CIBC, NBC
- > **Osler Hoskin & Harcourt LLP** represented Genworth Financial Inc.
- > **Blake Cassels & Graydon LLP** represented Genworth Financial Inc.

HONOURABLE MENTION

BROOKFIELD BUYS NATURAL GAS PROCESSING BUSINESSES FROM ENBRIDGE

Announced on the last day of 2019, Enbridge announced the closing of the federally regulated portion of its deal to sell its natural gas gathering and processing assets to Brookfield Infrastructure. The deal unfolded in two phases, the first of which — the provincially regulated portion — closed in autumn 2018.

The \$4.3-billion deal included 19 natural gas processing plants and 3,550 kilometres of pipeline in B.C. and Alberta. Under Brookfield, the gas business will be named NorthRiver Midstream Inc.

Canadian law firm involvement

- > **Norton Rose Fulbright Canada LLP** represented Brookfield Infrastructure Partners
- > **Torys LLP** represented Enbridge
- > **Osler Hoskin & Harcourt LLP** represented lenders and underwriters
- > **McCarthy Tétrault LLP** represented Enbridge

CANNABIS > WINNER



CANOPY GROWTH IMPLEMENTS PLAN OF ARRANGEMENT TO ACQUIRE U.S. MULTI-STATE CANNABIS OPERATOR ACREAGE HOLDINGS FOR US\$3.4 BILLION

THE BURGEONING cannabis market was choppy in 2019 with a drop in activity as compared to a frothy 2018. The top cannabis deal on *Expert's* list is unique in how it relies on the future federal legalization of cannabis in the United States. In April, Canopy Growth Corp. purchased the right — for up to 90 months — to acquire all the shares of U.S.-based Acreage Holdings Inc. when the product becomes legal to produce and sell at the federal level in that country.

For phase one of the deal, Acreage shareholders got US\$300 million, or around US\$2.55 per share. For phase two, when cannabis is legalized in the U.S., Acreage subordinate-voting shareholders will receive .5818 of a common Canopy share for each Acreage subordinate-voting share held.

Canopy Growth said the deal provides “an accelerated pathway” into U.S. cannabis markets and gives Acreage “improved access to

capital.” Canopy and Acreage will also execute a licensing agreement giving Acreage access to Canopy brands and intellectual property.

Acreage Holdings is the largest vertically integrated, multi-state owner of cannabis licences and assets in the U.S., owning licences to operate or management services agreements with licence holders in 20 states, including pending acquisitions, the *CBC* reported.

Canadian law firm involvement

- > **Cassels Brock & Blackwell LLP** represented Canopy Growth
- > **Stikeman Elliott LLP** represented the special committee of Acreage Holdings
- > **McCarthy Tétrault LLP** represented Canopy's financial advisors
- > **Osler Hoskin & Harcourt LLP** represented Constellation Brands (Canopy shareholder)

HONOURABLE MENTION

APHRIA'S TAKEOVER DEFENCE OF THE HOSTILE BID BY GREEN GROWTH BRANDS INC., VALUED AT APPROXIMATELY \$2.5 BILLION

On April 25, Aphria Inc. announced the attempted takeover by Green Growth Brands Inc. was terminated. The Canadian cannabis company Aphria rejected the hostile takeover bid from U.S.-based Green Growth on a unanimous call by Aphria's board of directors, who also said the bid “significantly” undervalued Aphria, discounting its share price by 23 per cent. The board also said the takeover would delist the company from the TSX and NYSE and give Green Growth shareholders 36 per cent interest in Aphria in exchange for “shares in a company with limited operations or other experience in the cannabis industry.”

Aphria's CEO and co-founder both left the company in 2019. The exits came after a short-seller's report raised questions about recent acquisitions and accused the company of being overvalued.

Canadian law firm involvement

- > **Norton Rose Fulbright Canada LLP** represented Green Growth Brands
- > **McCarthy Tétrault LLP** represented Aphria Inc. financial advisor Scotia Capital
- > **Fasken Martineau DuMoulin LLP** represented Aphria



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Tom provides strategic advice on corporate finance, venture capital, M&A and corporate governance matters to clients across various industry sectors, with an emphasis on the technology and not-for-profit sectors. Tom is a past co-chair of Dentons' Canada Corporate Practice Group and a past co-leader of Dentons' Global Corporate Practice Group. Tom has particular expertise in technology startups and has assisted many companies from formation through successful exits. Many transactions have involved cross-border elements, both on investments and acquisitions. In recent years, Tom has also become more actively involved in providing corporate governance advice to industry associations and others in the not-for-profit sector. Tom has been recognized by key legal publications extensively in the areas of Corporate Commercial Law, Corporate Finance & Securities, M&A, Private Equity, Venture Capital and Technology, and he has received numerous awards, including the *Diamond Jubilee Medal* from the Governor General in honour of his contributions to Canada, and the *Advocacy Leadership Award* from the Canadian Advanced Technology Alliance (CATA).



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Lawson Hunter is one of Canada's renowned regulatory and government relations counsel, drawing on a wide range of experience in business, government and private practice. Most recently, Lawson was recognized as the 2016 recipient of the Chambers Canada Lifetime Achievement award for his prominent practice and global reputation as a leading lifetime practitioner and influential member of the Canadian Bar. Formerly Canada's senior civil servant in charge of competition policy and enforcement, Lawson was primarily responsible for the drafting of the federal Competition Act. From 1993 to 2003, he was a partner of Stikeman Elliott and head of the firm's Competition/Antitrust Group. From 2003 to 2008, he served as executive vice-president and chief corporate officer of Bell Canada and BCE Inc., where he was responsible for overseeing regulatory, governmental relations and corporate affairs. In September 2008, he rejoined the Ottawa office of Stikeman Elliott as counsel. From April 2010 to May 2012, Lawson assumed the role of head of the Competition and Foreign Investment Group and recently returned to his role as counsel. Lawson advises a wide variety of Canadian and multinational corporations on all aspects of federal regulatory law and policy.



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Andrea is co-lead of Dentons' global private equity practice and is nationally recognized as a leading lawyer in Canadian PE. She advises sponsors and PE-backed companies in LBOs, recaps, secondaries and roll-up strategies and is experienced in fund formation for VC and PE funds. She also guides companies through IPOs and financing and liquidity events in the public markets. Andrea's focus is on the technology sector, in particular software/SaaS, fintech, tech-enabled consumer brands and advanced manufacturing. She regularly leads high-profile and high-value transactions in Canada in the tech sector. Andrea is a major exporter of deal work to other Dentons' offices and a top choice for referrals into the Canada region, which is a strong testament to her client service and deal savvy. Andrea's mission is to help Canadian technology companies grow. She has worked at all points along the technology company lifecycle, from helping to found Dentons' startup program to advising companies and boards on IPOs and public M&A. Andrea serves on advisory committees for the OSC, the TSX and the Ontario government, contributing to policy directions that interest high-growth companies. She is on the Canada Region Board of Dentons, as well as the board of directors for Hydro Ottawa.



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Warren Katz is managing partner of the Montréal office and a member of the firm's Partnership Board and Executive Committee. He specializes in cross-border mergers and acquisitions involving both public and private companies and investment funds, public offerings, private placements and going-private transactions. He is recognized as a leading U.S./Canada cross-border M&A lawyer.

ENTERTAINMENT EVOLVES > WINNER



HASBRO ACQUIRES ENTERTAINMENT ONE FOR \$5.3 BILLION

THE \$5.3-BILLION, all-cash deal is a strategic combination between a global play and entertainment company and a global independent studio. “Truly international in scope,” the Canadian eOne is also listed on the London Stock Exchange and is being acquired by the Nasdaq-listed U.S. corporation and the deal involves assets and regulatory approvals from all over the world, one lawyer on the deal told *Lexpert*.

Hasbro Inc. is an international toy, game and entertainment company and Entertainment One Ltd. is Canada’s largest independent film, television and music producer.

Entertainment One is owner of well-known children’s entertainment intellec-

tual property such as Peppa Pig, PJ Masks, Ricky Zoom, Clifford the Big Red Dog and others. The deal will consolidate the content of every child’s imagination by linking those brands with Hasbro’s My Little Pony, Nerf, Play-Doh and Power Rangers.

Under the terms of the agreement, Entertainment One shareholders will get \$9.55 for every common share. The deal responds to the swift industry consolidation and the disrupting effect of media and content providers such as Apple, Amazon, Netflix and Disney, a lawyer on the deal told *Lexpert*.

Canadian law firm involvement

- > **Stikeman Elliott LLP** represented Hasbro Inc.
- > **Osler Hoskin & Harcourt LLP** represented Entertainment One

HONOURABLE MENTION

FLUTTER ENTERTAINMENT AND THE STARS GROUP MERGE

Two of the biggest names in online betting joined forces in the US\$15-billion combination between Flutter Entertainment and The Stars Group.

The now merged entities had together earned more than \$6.5 billion in 2018, making the combination the largest online betting and gaming operator on earth, according to their announcement of the deal. The merger comes on the cusp of new growth opportunities in the U.S. market, as a recent U.S. Supreme court ruling in 2018 struck down the federal law prohibiting most states from legalizing sports betting.

The combined company intends to “maximize growth” in its core markets: U.K., Ireland and Australia, while expanding in Spain, Italy and the U.S., said the company’s announcement.

Canadian law firm involvement

- > **Stikeman Elliott LLP** represented Flutter Entertainment PLC
- > **Osler Hoskin & Harcourt LLP** represented Stars Group Inc.
- > **Fasken Martineau DuMoulin LLP** represented ValueAct Holdings L.P.
- > **Blake Cassels & Graydon LLP** represented The Stars Group



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Jay Kellerman is a partner and head of the Mining Group and a member of the Mergers & Acquisitions and Capital Markets Groups. He served as the managing partner of the firm's Toronto office for six years (2012–2018). With more than 25 years of experience, his clients include public companies, investment banks, investors and boards of directors. Jay is recognized as one of the top mining lawyers in the world by *Who's Who Legal* and is considered a "most highly regarded individual" and "excellent" in financing and M&A by *International Who's Who of Mining Lawyers* and "one of the best in the business" by *International Who's Who of Business Lawyers* as it relates to mining. Jay frequently speaks at seminars on corporate and securities law topics and was previously co-editor of Carswell Reporting Services' *Canadian Cases on the Law of Securities*. He is a member of Prospectors and Developers Association of Canada (PDAC). Jay spent one year seconded to the General Counsel's Office of the Ontario Securities Commission.



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Brian Kelsall specializes in corporate project finance with particular emphasis on public private partnerships and infrastructure development both internationally and domestically. He advises lenders, sponsors and investors in respect of projects in Canada and abroad in the infrastructure, energy, telecom, mining, oil and gas and power sectors. He has extensive banking law, securitization and mergers and acquisitions experience. Brian advises participants in respect of projects in Canada in the infrastructure, mining, energy, power and real estate sectors. Recent transactions in which Brian acted as lead counsel include advising the lenders on Infrastructure Ontario's Eglinton Crosslinx PPP Project, advising the winning consortium on the U.S. Pennsylvania Bridges Project and the U.S. 36 Toll Road Project in Colorado and advising the federal government on its Communications Security Establishment Canada Long-Term Accommodation Project. Brian is a member of the Law Society of England and Wales and the International Bar Association. He is recognized by several publications as a leading practitioner in project finance and banking law, in Canada and internationally. Brian was called to the Ontario Bar in 1982, the Alberta Bar in 1985 and the Roll of Solicitors of England and Wales in 2005.



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Leanne is a member of the firm's Corporate Group. She is the Canada co-chair and a global lead for Dentons' Mining Group, as well as a member of the Dentons Canada LLP National Board. Leanne provides advice to clients on mergers, acquisitions and sale transactions, including plans of arrangement, reverse takeovers, reorganizations and amalgamations. She also assists both public and private issuers, including municipalities, in raising capital through private placements, public offerings, venture capital financings and commercial paper offerings. She also interacts with the stock exchanges and other securities regulatory authorities in Canada in connection with various applications on behalf of reporting issuers and exempt market dealers. Leanne is routinely involved in the negotiation and drafting of commercial agreements relating to the establishment of joint ventures and other strategic partnerships, unanimous shareholder agreements, construction contracts, including subcontracts, procurement contracts and long-term supply, offtake and purchase agreements. Leanne represents clients in the mining, construction, engineering, oilfield service and technology industries.



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Sophie Lamonde is a partner, head of the Montréal office's Mergers & Acquisitions Group and a member of the firm's Partnership Board. Her practice is directed primarily to the areas of mergers and acquisitions and private equity, with a particular focus on cross-border transactions. Sophie's experience includes advising several Canadian and foreign clients in acquisitions, divestitures, reorganizations and general commercial negotiations. She works with businesses in various industries, including retail, manufacturing, contract research, technology and media.

INDIGENOUS INFLUENCE > WINNER



THE C\$1.9-BILLION WATAYNIKANEYAP TRANSMISSION PROJECT IN NORTHWESTERN ONTARIO

A DECADE in the making, the project is majority owned by a holding company consisting of 24 First Nations. The deal had “unprecedented First Nations involvement and impact,” said Lynn Parsons, partner in McCarthy Tétrault’s financial services group and the firm’s lead counsel on the project. “For the first time, thousands of residents in remote areas across Northwestern Ontario will have access to clean, reliable energy, eliminating the financially unsustainable and environmentally risky reliance on costly diesel generation.”

The Wataynikaneyap transmission project is a 1,725-km system connecting 17 remote First Nations communities in Northwestern Ontario. The project was built in partnership with Fortis Inc., will cost approximately \$1.9 billion and is expected to be completed in 2023. The Ontario government said in an October announcement that the project will provide reliable electricity to more than 14,000 Indigenous people.

The project was financed through a multi-layer debt financing, including a \$1.34-billion loan from the Ontario government, a \$680-million loan from a five-

bank syndicate and a \$220-million loan from two life insurance companies, Stikeman Elliott LLP, which acted on the deal, told *Lexpert*.

Canadian law firm involvement

- > **Stikeman Elliott LLP** represented First Nations Limited Partnership
- > **McCarthy Tétrault LLP** represented equity lenders Manulife and Sun Life
- > **Torys LLP** represented Wataynikaneyap Power
- > **Osler Hoskin & Harcourt LLP** represented the syndicate of lenders
- > **Davies Ward Phillips & Vineberg LLP** represented Fortis Inc. and its subsidiary FortisOntario Inc.
- > **Fasken Martineau DuMoulin LLP** represented the Government of Ontario’s Minister of Energy, Northern Development and Mines

HONOURABLE MENTIONS

FIRST AIR AND CANADIAN NORTH MERGE, CREATING INUIT-OWNED NORTHERN CANADIAN AIRLINE

The deal between Makivik Corporation — owner of First Air — and Inuvialuit Development Corporation — owner of Canadian North — was the first ever public interest review carried out under the Canada Transportation Act and included the “very rare” issuing of a public and detailed Competition Bureau report, Bennett Jones told *Lexpert*.

Canadian law firm involvement

- > Bennett Jones LLP represented Inuvialuit Development Corporation, as owner of the Canadian North airline
- > Norton Rose Fulbright Canada LLP represented First Air/Makivik

TD GREYSTONE ASSET MANAGEMENT ACQUIRES ALBERTA POWERLINE FROM CANADIAN UTILITIES LIMITED AND QUANTA SERVICES INC. FOR \$1.7 BILLION

In another example of Indigenous ownership of energy infrastructure, seven Alberta Indigenous communities took a 40-per-cent equity stake in the Alberta PowerLine. Canadian Utilities Limited and Quanta services sold the project to those communities and a consortium including TD Greystone Asset Management. The transmission line was originally financed through the largest P3 bond transaction in Canadian history, according to Bennett Jones.

Canadian law firm involvement

- > Bennett Jones LLP represented Canadian Utilities Limited
- > McCarthy Tétrault LLP represented TD Greystone, IST3
- > Fasken Martineau DuMoulin LLP represented Quanta Services Inc.



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Chair of Goodmans LLP. Practises corporate, commercial and securities law, and provides counsel in connection with public offerings, M&A and business restructurings. Director of Maple Leaf Sports & Entertainment Ltd. and an alternate governor of the NHL, NBA and CFL. In 2019, elected chair of the Board of Governors of the CFL. In 2018, appointed chair of the Baycrest Board of Directors. Serves as an honorary trustee of the Hospital for Sick Children, and sits on the Board of Directors of RioCan Real Estate Investment Trust and Roots Ltd. In 2017, named a Member of the Order of Canada and, in 2014, appointed by the Minister of National Defence as an Honorary Captain of the Royal Canadian Navy. Recognized among "Toronto's 50 Most Influential People" by *Toronto Life* magazine. Honoured as one of the ICRF's "Men of Distinction" for his philanthropic efforts and contributions to the community. Securities law lecturer at Osgoode Hall Law School for more than three decades and recipient of the Adjunct Faculty Award for Teaching Excellence and Alumni Gold Key Award for outstanding professional achievement and contribution to the legal community. Recognized as a leading lawyer in corporate/commercial, corporate finance and securities and M&A by numerous publications around the world.



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Pierre-Yves Leduc is a partner and head of the Montréal office's Securities Group. His practice focuses primarily in the areas of mergers and acquisitions (public and private), securities and corporate finance. His assignments have included acting as counsel to issuers and underwriters in public offerings and private placements and to corporations in acquisitions and divestitures. He advises both buyers and sellers on numerous takeover bids, going-private and restructuring transactions. He also advises on corporate governance matters.



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David Lemieux practises mainly in corporate financing and restructuring. He frequently organizes and leads teams of lawyers to represent lending syndicates, borrowers and investors. His practice covers the full spectrum of Canadian, cross-border and foreign matters related to project financing, public and private takeover bids, asset acquisitions, monetization, securitization, asset financing and debt restructuring. David is involved in the negotiation, preparation and finalization of all aspects of these transactions, including the corporate structuring, credit documentation, agreements between creditors, security documents and the restructuring of debt. He has been Repeatedly Recommended in Banking & Financial Institutions by *The Canadian Legal Lexpert*® Directory. He has also been recognized as Lawyer of the Year in the 2020 edition of *Best Lawyers*, and is also recognized in *Who's Who Legal*, in *IFLR1000* and in *Chambers Canada*.

IPO MARKET > WINNER



LIGHTSPEED POS INC. IN CONNECTION WITH ITS INITIAL PUBLIC OFFERING ON THE TORONTO STOCK EXCHANGE OF SUBORDINATE VOTING SHARES

IN THE BIGGEST IPO by a Canadian technology company in almost nine years and among the 10 largest technology IPOs in TSX history, the Montreal-based point-of-sale and ecommerce service raised \$276,000,000.

The IPO, which closed March 15, consisted of an offering of 17,250,000 subordinate voting shares at \$16 per share. The IPO was underwritten by a syndicate co-led by BMO Nesbitt Burns Inc., National Bank Financial Inc. and J.P. Morgan Securities Inc. and included CIBC World Markets Inc., TD Securities Inc., Raymond James Ltd. and Scotia Capital Inc.

Lightspeed's success came after 2018 was "a record year for the innovation sector on the TSX and TSXV," with 59 new companies listed, said the TMX Group — parent

company of the TSX — at the time of the Lightspeed IPO.

Lightspeed CEO and founder Dax Dasilva was named one of 2019's Top CEOs and his company was named innovator of the year, by the *Globe and Mail Report on Business*. In 2019, the company launched global loyalty and payment systems, expanded its client base and acquired an Australian company, gaining a foothold in the Asia Pacific market. Most recently, it has announced it will spend more than US\$100 million in cash and stock to buy a German point-of-sale company to expand within Europe.

The Lightspeed IPO was a rare bright spot in Canada's capital markets. Last summer, GTA-based waste management company GFL opted not to go ahead with its planned IPO, which was expected to raise

more than US\$2 billion.

While GFL had put the price of shares at around \$20, the banks leading the sale told investors they were worth \$18, and investors were also spooked at the company's debt load and growth prospects, reported *Bloomberg* in November. Even at the lower rate, the listing on the New York and Toronto stock exchanges would have been the biggest for a Canadian company since ManuLife Financial Corp.'s from 1999 and would have given GFL a market value of US\$5 billion, said *Bloomberg*.

Canadian law firm involvement

- > **Stikeman Elliott LLP** represented Lightspeed POS
- > **Osler Hoskin & Harcourt LLP** represented the underwriters in Canada



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MINING SAGA > WINNER



NEWMONT'S \$10-BILLION ACQUISITION OF GOLDCORP AND SUBSEQUENT JOINT VENTURE WITH BARRICK GOLD

ON APRIL 18, 2019, Newmont Mining Corporation completed its acquisition — via plan of arrangement — of Goldcorp Inc. The \$10-billion deal makes Newmont Goldcorp the largest gold company in the world. In the stock-for-stock transaction, Newmont acquired each Goldcorp share for 0.3280 of a Newmont share and US\$0.02 in cash. The company is forecasted to produce six to seven million ounces of gold every year for the next decade, *Reuters* reported.

After the merger, Newmont Goldcorp and Barrick Gold combined their mining properties in Nevada, creating the world's largest gold-producing complex, in a deal Barrick Gold president and CEO Mark Bristow said was 20 years in the making. The world's top two gold producers closed the deal Canada Day and the Newmont/Barrick joint venture includes 10 underground and 12 open-pit mines, two autoclave facilities, two roasting plants, four oxide mills, a flotation plant and five heap-leach operations. In 2018, this northeastern Nevada operation produced 4.1 million ounces of gold. Newmont will own 38.5 per cent and Barrick 61.5 per cent, and the deal will save an estimated \$500 million per year in “average annual pre-tax synergies,” said a Barrick announcement.

The venture comes a year after Barrick's merger with Randgold Resources Ltd., for US\$6.062 billion. The purposes of the transaction were for Barrick Gold Corp to offer new products and services, strengthen operations and expand its presence in new geographical regions, to create synergies, increase shareholder value and to take advantage of sound investment opportunities, *Lexpert* reported back in 2018.

Canadian law firm involvement

- > **Goodmans LLP** represented Newmont Mining in Canada
- > **Osler Hoskin & Harcourt LLP** represented the special committee of independent directors of Goldcorp
- > **Davies Ward Phillips & Vineberg LLP** represented Barrick Gold Corporation in Canada
- > **Cassels Brock & Blackwell LLP** represented Goldcorp in its sale to Newmont Mining Corporation
- > **Blake Cassels & Graydon LLP** represented Bank of America Merrill Lynch, financial advisor to Goldcorp Inc,

HONOURABLE MENTION

OSISKO MINING COMPLETES REVERSE TAKEOVER OF CHANTRELL VENTURES CORP, CREATING O3 MINING INC.

On July 5, 2019, Osisko Mining Inc. completed a spin-out transaction via plan of arrangement with Chantrell Ventures Corp. Osisko — the mineral exploration company — traded two projects, other exploration properties and a portfolio of selected securities for 24,977,898 post-consolidation common shares of Chantrell. The common shares were consolidated on a 40-to-one basis and the entire board of directors was reconstituted in the transaction. Chantrell Ventures Corp. was changed to O3 Mining.

Canadian law firm involvement

- > **Bennett Jones LLP** represented Osisko and later O3 Mining
- > **Cassels Brock & Blackwell LLP** represented Chantrell Ventures
- > **Peterson McVicar LLP** represented Chantrell tranche offering



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OILPATCH SELL-OFF > WINNER



PEMBINA PIPELINE CORPORATION ACQUIRES KINDER MORGAN FOR \$4.35 BILLION

THE YEAR 2019 CONTINUED the trend of consolidation in the Canadian oilsands and the Pembina transaction was part of a generally higher level of M&A in the mid-stream sector. The deal raised challenges such as cross-border regulatory approvals and the co-ordination of public acquisition with the private transaction, said Stikeman Elliott, which acted on the deal.

In two concurrent acquisitions, Pembina Pipeline Corporation first acquired Kinder Morgan Canada Limited via plan of arrangement for \$2.3 billion and then acquired the U.S. portion of the Cochin pipeline system for \$2.05 billion, both from Kinder Morgan Inc. Through these two transactions, Pembina becomes owner of the entire Cochin pipeline system and related assets. The cross-border pipeline system links Pembina's Channahon, Bakken and Edmonton-area assets and connects them to markets in Mont Belvieu, Texas; Conway, Oklahoma and Edmonton.

The plan-of-arrangement acquisition also involved multi-tiered exchanges of securities, including the exchanges of two classes of voting securities, a class of units of a limited partnership that participated in the Canadian

assets with Kinder Morgan and preferred shares of Kinder Morgan — at the option of preferred shareholders, said Stikeman Elliott.

With these difficulties in mind, another lawyer on the transaction said the deal showed that a strong special committee process can be essential in getting a complex, related-party transaction completed without litigation or regulatory scrutiny. There was potential for conflict because Pembina was buying Kinder Morgan Canada Limited plus separate assets, both from Kinder Morgan Inc. An actively engaged special committee meant the deal

was supported by minority shareholders at a time when many transactions are subject to shareholder dissent, the lawyer said.

The Cochin Pipeline system spans 2,900 km — from Chicago to Fort Saskatchewan, Alberta. It can transport up to 110,000 barrels per day.

Canadian law firm involvement

- > **Stikeman Elliott LLP** represented Pembina Pipeline Corporation
- > **Goodmans LLP** represented special committee of Kinder Morgan Canada
- > **Osler Hoskin & Harcourt LLP** represented BMO Capital Markets, financial advisor to Kinder Morgan's special committee
- > **Blake Cassels & Graydon LLP** represented Kinder Morgan

HONOURABLE MENTION

CANADIAN NATURAL COMPLETES \$3.775-BILLION ACQUISITION OF DEVON CANADA ASSETS

In a deal that closed June 27, Canadian Natural Resources Limited acquired substantially all the assets of Devon Canada Corporation. With a cash-purchase price of \$3.775 billion, this was one of 2019's largest upstream oil and gas M&A deals in North America.

Canadian law firm involvement

- > **Cassels Brock & Blackwell LLP** represented Canadian Natural Resources Limited.
- > **Bennett Jones LLP** represented Devon Canada Corporation.
- > **Norton Rose Fulbright Canada LLP** represented the agent and syndicate of lenders on the \$3.25-billion Term Credit Agreement.

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REITS > WINNER



DREAM GLOBAL SALE TO BLACKSTONE FOR \$6.2 BILLION

IN A DEAL closed Dec. 10, The Blackstone Group Inc. acquired all the subsidiaries and assets of Dream Global Real Estate Investment Trust.

With the value of the all-cash transaction at \$6.2 billion (including debt), this is Canada's largest REIT M&A deal in history and Blackstone's second Canadian REIT acquisition in 18 months. The deal adds Dream Global's portfolio of more than 200 office and industrial properties in Western Europe — primarily in Germany and the Netherlands — to Blackstone's real estate business. Blackstone has \$157 billion in investor capital under management and

a global real estate portfolio of \$324 billion, making it among the largest property owners in the world.

The year 2019 was a good year for REITS, as a class, with a strong stock market, low interest rates and lots of deal activity, one lawyer on the deal told *Lexpert*. Dream Global's complex structure required a sophisticated purchaser and Dream Global's unitholders approved the transaction resoundingly, with 99 per cent of the votes cast in favour.

The deal cost Blackstone \$16.79 per Dream Global unit, which was widely reported as an 18.56-per-cent premium on Dream Global's share price at the time. Some Blackstone

purchasers received newly created Class B units and the other units were redeemed. The transaction also separated Dream Global's subsidiary, Dream Asset Management Corporation, as the company's external asset manager and gave certain Blackstone purchasers minority interests in some of Dream Global's properties.

Canadian law firm involvement

- > **Davies Ward Phillips & Vineberg LLP** represented Blackstone in Canada
- > **Goodmans LLP** represented the special committee of the board of trustees of Dream Global
- > **Osler Hoskin & Harcourt LLP** represented Dream Global Real Estate Investment Trust
- > **Blake Cassels & Graydon LLP** represented TD Securities, as financial advisor.



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SHAREHOLDER ACTIVISM > WINNER



PAULSON & CO. REPLACING THE BOARD OF DETOUR GOLD CORPORATION

A YEAR AFTER Canada saw 13 public proxy fights — the most since 2014 — that number rose in 2019 to 18. Last year, the proxy battle that distinguished itself above the rest was U.S.-based hedge fund Paulson & Co.’s campaign to change the management structure at Detour Gold Corporation.

In the last two years, shareholder activism in Canada has been concentrated in the mining and energy sectors, with 40 per cent mining and 20 per cent in energy out of the 30 public contests.

In December, Detour-shareholder Paulson & Co. succeeded in convincing the mining company’s shareholders to depose

the majority of the company’s board of directors, including the interim CEO and the chairman, reported *Bloomberg*. Shareholders chose five nominees backed by Paulson to serve on the board. In all, seven out of the eight board members in place when the proxy battle ensued were gone by the end of 2019.

The Paulson/Detour proxy battle represents a trend of activist shareholders “vigorously shaking up the management and boards of underperforming companies in the mining industry,” said Shea Small, co-head of McCarthy Tétrault’s mergers and acquisitions group.

Canadian law firm involvement

- > **Goodmans LLP** represented Paulson & Co
- > **Norton Rose Fulbright Canada LLP** represented Detour Gold Corporation
- > **McCarthy Tétrault LLP** represented Detour Gold Corporation

HONOURABLE MENTION

TRANSALTA NEGOTIATES STRATEGIC INVESTMENT WITH BROOKFIELD

TransAlta Corporation, the Calgary-based power generator and electricity marketer completed the first tranche of a \$750-million strategic investment by an affiliate of Brookfield Renewable Partners.

The deal was complicated by a proxy battle launched by two major shareholders. Bluescape Energy Partners and Mangrove Partners, who together held 10.1 per cent of TransAlta’s common shares, engaged TransAlta to obtain board seats and governance and operational changes. Mangrove and Bluescape then filed a joint Schedule 13D and submitted notice of intention to nominate five directors for election at the next shareholders meeting, under TransAlta’s advance-notice bylaw.

Anticipating a proxy contest and attempting to avoid binding a future reconstituted board to a transaction, TransAlta used the novel “Governance Out,” whereby they negotiated a right to enable a new board to revisit the Brookfield transaction. Under the Governance Out, if two directors not recommended by the board were elected at the 2019 meeting, TransAlta would have the right for 30 days to terminate the Brookfield transaction. Bluescape and Mangrove did not end up running a proxy contest, but Mangrove brought an ultimately unsuccessful public interest proceeding before the Ontario and Alberta Securities commissions.

Canadian law firm involvement

- > **Davies Ward Phillips & Vineberg LLP** represented TransAlta
- > **Torys LLP** represented Brookfield
- > **Stikeman Elliott LLP** represented Bluescape Energy Partners



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Litigation Trends in Canada 2020



WITH LEGISLATION, regulation, jurisprudence and practice evolving continually and rapidly, the need to stay current is more pressing than ever.

With this in mind at the start of the new year, we prepared a summary of the main trends in Canadian litigation, grouped into three categories: cannabis-related, class action and energy sector litigation. The first two will be felt nationally; the last is more focused on Alberta.

CANNABIS-RELATED LITIGATION

One year after recreational cannabis was legalized across Canada, litigation around the industry is breaking ground.

As supply, distribution and regulatory issues have arisen, many of the industry's stocks have lost their lustre: By mid-November 2019, some were more than 70 per cent off their highs. Solvency risks and cannabis-related securities class actions started materializing, and litigation over quality, quantity, delivery dates and unique contractual terms began to emerge. Regulators increased scrutiny of disclosure expecta-

tions, director independence, "inadequate transparency" regarding cross-ownerships and issuers' conflicts of interest.

This points out that multi-faceted, multi-jurisdictional litigation is definitely worth watching.

CLASS ACTIONS

Three areas of class action litigation likely to dominate in 2020 are:

1. Privacy Law and Data Protection Class Actions

With Canadian courts having recently recognized a new tort called "intrusion upon seclusion" (i.e., an invasion of privacy), and mandatory data breach reporting having been in effect since November 2019, data breach litigation should continue to rise in 2020 and beyond. Two recent developments favourable to defendants are: (i) a Superior Court of Quebec holding that annoyance and concern following personal data theft is a normal inconvenience of living in society and not compensable; and (ii) first instance Ontario cases suggesting that

certain privacy breaches are not suited to class treatment because they raise too many individual issues.

2. Securities Class Actions

Securities class actions are nowhere near as prevalent in Canada as they are in the U.S. Canada still sees relatively few stand-alone proceedings where there are no previous restatements or regulatory actions. Most are launched on the heels of (i) corrective disclosure by the issuer, (ii) a regulatory investigation or (iii) enforcement proceedings. While enforcement proceedings are inherently public, many investigations are conducted confidentially. However, some do garner media attention either due to the investigation's scope or a regulatory decision that disclosure of certain issues is in the public interest.

We expect the increased scrutiny to continue in 2020. Regulators are particularly focused on nascent industries like cannabis and crypto-currencies. Given the tendency of plaintiffs' lawyers to piggyback on regulatory action, an uptick in securities class actions seems inevitable. While these had abated, they are on the rise again, particularly in Ontario and to a lesser extent in Quebec.

3. Competition Law Class Actions

In late 2019, the Supreme Court of Canada (SCC) ruled that "umbrella purchasers" — purchasers of a non-price fixed product whose price allegedly increased due to market forces resulting from a conspiracy — can be included as plaintiffs in Canadian price-fixing class actions.

Most competition class actions in Canada have their origins in enforcement proceedings by U.S. and international regulators, and by the Canadian Competition Bureau. Interestingly, however, U.S. courts

have deemed umbrella purchasers' interests as too remote to be actionable. The SCC decision means that even when Canadian actions are based on U.S. enforcement proceedings or amount to "copycat" cases, Canadian classes will become larger, potential exposure will increase and litigation costs will rise as additional groups of claimants increase the complexity of assessing damages.

Canada's Commissioner of Competition Matthew Boswell has also committed to a policy of "active enforcement" that has the digital, telecommunications, pharmaceutical and infrastructure sectors squarely on the Bureau's radar. Since Boswell's appointment in May 2019, the Bureau has demonstrated that it has every intention of following through on this commitment. The upshot is that the coming years are likely to see even more activity in the competition class action arena.

ENERGY SECTOR LITIGATION

Litigation in the energy industry has been active and volatile since the 2015 downturn. Low prices for Canadian heavy crude and natural gas, coupled with restricted world markets, have caused serious financial stress for energy companies — an environment that has now persisted into its fifth year and has had a major impact on litigation in Western Canada.

1. Oil and Gas Litigation

The continuing low pricing environment, financial stress and the need to bolster cash flow has led affected companies, particularly those involved in joint ventures in the upstream and midstream space, to litigate disputes as opposed to demonstrating the greater elasticity that existed in this interconnected sector in better times. Put another way, there are more bet-the-company

cases now, where survival can turn on sums that are less significant than when profits were rolling in. This more "aggressive" approach to dispute resolution has resulted in an increase in litigation, either in the courts or by way of arbitration.

2. Restructuring and Insolvency

More restructuring and insolvencies are looming for 2020 and 2021 in this sector. Activity is on a steep rise for practitioners who have been busy since the latter half of 2019. Banks, who have long been lenient with their customers, are beginning to lose patience in an environment where more companies are holding on by a thread, with no relief in sight for the short or medium term. Recent Companies' Creditors Arrangement Act (CCAA) proceedings involving major midcap players are indicative of this trend, which will likely remain strong for the next few years.

3. Construction Litigation

A rash of construction litigation in Alberta may seem like a non sequitur: after all, it's hardly boom times for construction projects in the province. But, as usual, litigation tends to trail the boom times, and the downturn has led to more litigation of construction disputes that might have been overlooked or settled when times were good. These disputes are often coupled with troubled construction projects that were commenced during the boom and are now slowed or stalled, as cash flows shrink.

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COMPETITION & FOREIGN INVESTMENT

CANADA IS SEEN AS A STABLE DESTINATION FOR FOREIGN INVESTMENT, AND ITS PREDICTABLE REGULATORY ENVIRONMENT IS APPEALING FOR BUSINESSES THAT FACE MORE UNCERTAINTY IN OTHER COUNTRIES



CANADA SAW SOME big foreign deals in 2019 — and, generally, the country is hospitable to foreign investment. With a stable minority government, Canada’s environment for competition and foreign investment is a relatively safe one, lawyers agree.

“I don’t think there’s a [foreign] deal that’s going to put the government at risk,” says Jason Gudofsky, head of the Competition/Antitrust & Foreign Investment Group at McCarthy Tétrault LLP in Toronto. “For the next year or two, it’s a fairly safe environment politically.”

Stability is important for investors, notes Paul Collins, co-head of the competition & foreign investment group at Stikeman Elliott LLP in Toronto; but the global landscape in 2020 remains to be seen.

“Business folks, M&A doesn’t like uncertainty; it likes predictable conditions,” says Collins. “They don’t have to be predictably good; but when you have things like what [U.S. President Donald] Trump is doing with tariffs, it makes things unstable.



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“I think it’s a friendly environment [for foreign investment]. Most transactions, given the size of the thresholds, don’t require reviews.”

Jason Gudofsky
MCCARTHY TÉTRAULT LLP

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“That uncertainty can strangle deal-making and foreign investment.”

Here’s a look ahead to the regulatory environment and the competition and foreign investment landscape in 2020, as well as a look back to the year (and a bit) that was.

Canada’s big deals

Fintech deals such as PayPal’s acquisition of Hyperwallet in late 2018 and Global Payments’ merger with TSYS in September are U.S. deals that have had “Canadian aspects” and are more closely scrutinized by the Competition Bureau, says Julie Soloway, a partner in the competition, antitrust & foreign investment group at Blake Cassels & Graydon LLP in Toronto.

Fintech is a branch of the digital economy, and, last year, the Bureau made a “call-out” to stakeholders for information on poten-

tially anti-competitive conduct. It also hired a chief digital enforcement officer. Soloway anticipates seeing “movement in that area” as changes enacted by the Competition Bureau apply domestically but equally to foreign mergers. “Many of these giant tech companies are foreign.”

Some of the biggest deals of 2019 were in the cannabis sector, with the American Altria Group buying a 45-per-cent stake in the Canadian Cronos Group; Constellation Brands’ \$5-billion investment in Canada’s Canopy Growth; and Canopy Growth’s plan of arrangement with Acreage Holdings in the U.S., giving it an option to acquire it in future once federal laws concerning the cultivation, distribution and possession of cannabis change in that country.

“Cannabis deals are a beast unto themselves,” says Elisa Kearney, a partner in the



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“When you consider the size of our economy, we’re punching way above our weight. . . . For the most part, we have an enviable environment from a competition/anti-trust perspective.”

Paul Collins
STIKEMAN ELLIOTT LLP

competition and antitrust & foreign investment groups at Davies Ward Phillips & Vineberg LLP in Toronto, calling last year’s cross-border cannabis deals “novel and highly innovative.”

But Kearney predicts less significant investments and novel transactions in the cannabis sector in 2020. “What we’ll end up seeing is a consolidation of existing Canadian cannabis companies through asset sales, bankruptcies and consolidation of smaller players,” she says. “We won’t see another significant Canadian investment until the industry here has matured a little.”

Otherwise, big cross-border deals were across all industries, including: the U.S.’s Newmont Mining buying Canada’s Goldcorp Inc.; Parmalat, owned by the French Lactalis, buying the Canadian natural cheese business from Kraft Heinz Co.; Blackstone Group buying Canada’s Dream Global REIT for \$6.2 billion; the \$5.2-billion majority acquisition in GardaWorld by BC Partners; and Hasbro Inc.’s purchase of Canadian media company Entertainment One Ltd. for \$5.3 billion.

In the Hasbro-Entertainment One deal, a Canadian-controlled affiliate of Entertainment One will maintain control for purposes of Canadian regulations that restrict foreign ownership in the film production and distribution space, Kearney says, “so they had to be creative” in forming that deal. However, a report is expected to be delivered to the government early this year that may recommend changes to foreign ownership restrictions under the Broadcasting Act, she says.

Also in the cultural sector, Collins notes the end-of-year announcement that U.K.-based



*Source: Most recent annual report from Innovation, Science and Economic Development Canada

Cineworld Group PLC would buy Cineplex Inc., Canada’s largest chain of cinemas, for \$2.8 billion in a deal that was notable for the way the break fee was structured, he says.

Regulatory environment for foreign investors

Cross-border investments are governed by the Investment Canada Act, under which all investments into Canadian businesses by non-Canadian investors are subject to at least notice to the government and possibly a full-scale government review. Different thresholds apply to different countries, and investors qualify for higher investment thresholds from the European Union, the United States and other countries with which Canada has free-trade agreements.

The test for approval under the Act is “Net Benefit for Canada,” and a little more than \$1 billion in enterprise value for a proposed investment from investors from World Trade Organization countries that are not state-

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owned enterprises (SOEs) will trigger a full Net Benefit to Canada review.

When acquisitions of Canadian companies exceed that threshold, the minister of Innovation, Science, Economic Development may review or approve those deals. This “doesn’t capture a ton of investments per year,” says Soloway.

“Layered on top of that, what is the more interesting, and controversial, is [the government’s] ability to use national security rules contained in the act to review any investment they want. In recent years, that has meant investments from China.”

In the last annual report from Innovation, Science and Economic Development Canada for the fiscal year 2018-2019, there were four national security reviews from China, one from Singapore and two from Switzerland. China has also featured most promi-

Group Co. was allowed to purchase Nevsun Resources Ltd. in 2018, in a less sensitive sector than radio systems.

Even aside from China, Gudofsky sees a lot of interest on the national security side, as countries around the globe beef up their national security review, among them Germany and the U.K. Canada brought in its National Security Review in 2009 under the Investment Canada Act, he says, following the Ericsson-Nortel and the MacDonald, Dettwiler and Associates Ltd. transactions.

“Those deals brought Canada to think about national security,” he says. “A lot of interest these days is around national security.”

Yet the Canadian government is generally considered open to foreign investment, and Kearney notes Investment Canada’s annual report showing that foreign direct investment was up in 2018-2019. Thresholds for net benefit review have decreased, following “a really, really, intense review under the Investment Canada Act,” while the threshold transaction value for net benefit reviews “has increased significantly, to over \$1.5 billion for countries that Canada has a free-trade agreement with,” she says.

Gudofsky anticipates relatively few Investment Canada Act reviewable transactions since the threshold has increased. Aside from specific industries such as air transportation, broadcasting, telecommunications and banking, where there are restrictions on foreign ownership, “I think it’s a friendly environment. Most transactions, given the size of the thresholds, don’t require reviews.”

Traditionally, there has been more foreign investment in Canada’s oil and gas industry. “So much of our potential investment is in natural resources and oil and gas, and that’s a sector that’s extremely challenging” now, says Collins. “You’re seeing companies leave Canada. . . . Kinder Morgan [former owner of Trans Mountain Pipeline] was a big player in the oilpatch, and now they’re gone.”

Collins also cites factors that might make Canada less attractive to foreign investors, including “oppressive tax policies . . . and the ability to raise funds in Canada.” Although some sectors are very active, he says, and private equity is very interested in Canadian businesses, the oilpatch stands out as “very challenged.”

M&A LOVED CANNABIS IN 2019

Some of the biggest deals last year were in the cannabis sector

American Altria Group buying a 45-per-cent stake in the Canadian Cronos Group

Constellation Brands’ \$5-billion investment in Canada’s Canopy Growth

Canopy Growth’s plan of arrangement with Acreage Holdings in the U.S.

nently in previous years.

The government’s policy is to review any Chinese or Russian acquisition, Soloway says, and although the federal Liberal government had been perceived as very friendly to China in its early days, it became “less friendly and welcoming” over its tenure, notably blocking the purchase of Aecon Group by Chinese state-owned CCCI in 2018.

This was significant because of the embarrassment it can cause a foreign government that has been blocked by another government from investing in the target’s country, “and it does create a chill on future investment from that country,” says Soloway. At the same time, China SOE Zijin Mining





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Overall, though, he says, Canada is “a good environment for foreign investment.”

The landscape in 2020

On the competition side, “you can certainly see the Bureau being very enforcement-focused, even searching for non-reportable, non-notifiable deals,” Gudofsky says, “and the Bureau has been having fairly intense investigations in terms of document discovery and so forth.”

On the Investment Canada Act side, investors need to be mindful of articulating for the government, and for the public, what’s good for Canada about the case, and outlining this in the press release of the announcement, he

says. “Make sure it’s clear why the deal is good for Canada.”

Kearney sees less uncertainty around “the new NAFTA” — or CUSMA, the Canada-United States-Mexico Agreement — but continued uncertainty around Canada’s relationship with China, as well as the effects of the new Quebec government.

Still, she says, “I feel like 2020 will be a good year for Canada to do business and as a place for foreign investment.”

“When you consider the size of our economy, we’re punching way above our weight,” says Collins. “For the most part, we have an enviable environment from a competition/anti-trust perspective.” ■



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NEW TAX RULES HIT BUSINESS

DEVELOPMENTS IN INTERNATIONAL TAX RULES, INCLUDING THE INTRODUCTION OF THE MULTILATERAL INSTRUMENT AND AN INCREASED FOCUS ON TAX EVASION BY GLOBAL TAX AUTHORITIES, WILL REQUIRE MORE VIGILANCE FROM TAXPAYERS IN CANADA

THE ORGANISATION FOR Economic Cooperation and Development's action plan on domestic tax base erosion and profit shifting, known as "BEPS," is coming into force among countries that have signed on to it — and Canadian taxpayers are now grappling with it.

The action plan was launched in 2013; a policy note released in January 2019, dubbed "BEPS 2.0," included new proposals to combat BEPS activities of multinationals. The OECD project aim is to stop billions of dollars being lost annually to tax avoidance by multinational companies operating in foreign jurisdictions, particularly in developing countries, which suffer from BEPS disproportionately owing to their higher reliance on corporate income tax.

On Jan. 1, the Multilateral Instrument, known as "MLI," entered into effect in Canada. It is just one of 15 of the OECD's "BEPS Actions." More than 135 countries and jurisdictions are now collaborating on the implementation of the BEPS package, with more than 90 having signed the Multilateral Instrument on BEPS, according to the OECD.

The Multilateral Instrument

The MLI is a multilateral treaty that modifies existing bilateral tax treaties to implement international tax measures developed by the OECD's BEPS project; this includes rules relating to treaty abuse and improving the dispute resolution process between participating jurisdictions.

The MLI works by allowing signatory countries such as Canada, Australia and the United Kingdom (notably not the United States) to adopt a variety of new tax rules into existing bilateral tax treaties in one fell swoop, says Robert Kreklewetz, a partner in tax firm Millar Kreklewetz LLP in Toronto. "They do that by ratifying a single agreement rather than renegotiating dozens of amendments to existing tax treaties."

The framework is designed to be flexible, and beyond certain rules — such as mandatory binding arbitration, treaty abuse prevention and changes to preambles of tax treaties — countries can choose to imple-



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approximate dollar value of these losses internationally

ment a variety of additional, optional measures, Kreklewetz says.

The MLI received royal assent in Canada on June 21, 2019, and it entered into force on Dec. 1, 2019. It applies to withholding taxes that start on Jan. 1, 2020, and, for all other taxes, for taxation years that begin on June 1, 2020 or after.

“Starting Jan. 1, 2020, any Canadian taxpayer making payments to a non-resident

will now need to ask whether the changes to Canada’s treaties, as a result of the MLI, will result in different withholding tax rates applying,” says Darren Hueppelsheuser, a tax partner in Norton Rose Fulbright Canada LLP’s Calgary office.

An example of that might be in the context of dividends, he says, “where you may have previously been able to rely on a treaty-reduced rate to five per cent or 15



per cent; the appropriate withholding [tax] now may be 25 per cent.” In that context, as a payor, i.e., the Canadian party paying the dividend, “you’ll need to do further diligence to see if the treaty rights you previously relied on are still available. If it’s in an international company structure, you’d want to be considering whether you want to be restructuring or reorganizing your busi-

ness if those treaty rights have changed.”

Of the provisions in the MLI, the one that may get the most attention is the broad anti-avoidance rule, or the Principle Purpose Test, under which treaty benefits can be denied if one of the principal purposes for the transaction is to avoid the relevant Canadian tax, says Patrick Marley, a tax partner at Osler Hoskin & Harcourt LLP in Toronto.

However, the treaty benefit may still be obtained if the person or corporation owing the tax can establish that obtaining the benefit would be in line with the object and purpose of the tax treaty.

“The big issue that Canadian taxpayers face is the uncertainty that’s been added,” Marley adds. Canada’s General Anti-Avoidance Rule, known as “GAAR,” applies for the purposes of tax treaties, and GAAR states that where a transaction or series of transactions results in a reduction, avoidance or deferral of taxes owing, and the transaction or series of transactions are being attempted only for the tax benefits, the transaction or transactions themselves may be invalidated.

“So, now, we have a second broad anti-avoidance rule [under the MLI’s Principal Purpose Test] that applies, or that could apply,” Marley says. “And while our domestic General Anti-Avoidance Rule has a few decades of case law and interpretation that have built up that allows a fair degree of certainty in terms of how that rule will be applied and administered, we have no precedent or history on this new anti-avoidance rule in the tax treaties.”

If the Canada Revenue Agency were to provide guidance consistent with Canadian law, “the ambiguity would go away,” Marley says. Instead, the CRA will use GAAR but also the MLI Principal Purpose Test, he says. “That’s wrong and costly.

“Over time, we’ll eventually get certainty when cases go to court or if we see how broadly or narrowly the CRA decides to interpret the rule,” he says.

The upshot is that more diligent assessment will be required of taxpayers to show that the principal reason for being resident in another jurisdiction is not simply to pay



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less or avoid taxes.

“From a taxpayer perspective, [the MLI] will involve a lot of diligence on their side to collect, retain and review . . . information,” says Hueppelsheuser.

Tax disputes

Tax authorities are also becoming more sophisticated with data collection and using that data to identify tax risks. There has been a recent trend among tax authorities, particularly the CRA, to take better advantage of information already at their disposal and to tap into sophisticated data collection performed by third-party businesses, says Kreklewetz.

For example, he says, in May 2019, the CRA announced the creation of a Real Estate Task Force designed to combat tax evasion in the Greater Toronto and Greater Vancouver areas. In a backgrounder to the release, the CRA announced that this

program had the ability to track “correlations” between a taxpayer’s reported income and their lifestyle. For taxpayers with expensive lifestyles without a corresponding income to match, this was possibly indicative of unreported income.

The CRA also has the capability to compile property transfer data

from across Canada and compare it to an individual taxpayer’s returns, again with the aim to uncover unreported income,

Kreklewetz adds.

The past year also saw the CRA’s high-profile use of Requirements for Information — or “RFIs” — on large third-party construction material suppliers such as Roofmart Ontario Inc.

“Using the RFI provisions under either the Income Tax Act or Excise Tax Act, the CRA has successfully compelled those businesses to disclose their customer data, namely identities and purchase history,” says Kreklewetz.

The CRA then compares those purchase histories with the returns of individual taxpayers (typically commercial contractors) to determine if the quantities of materials purchased are consistent with the reported income of those taxpayers. A similar approach can be taken for GST/HST audit purposes, to ensure that reported Sales Revenues and Input Tax Credit claims are appropriate, he says.

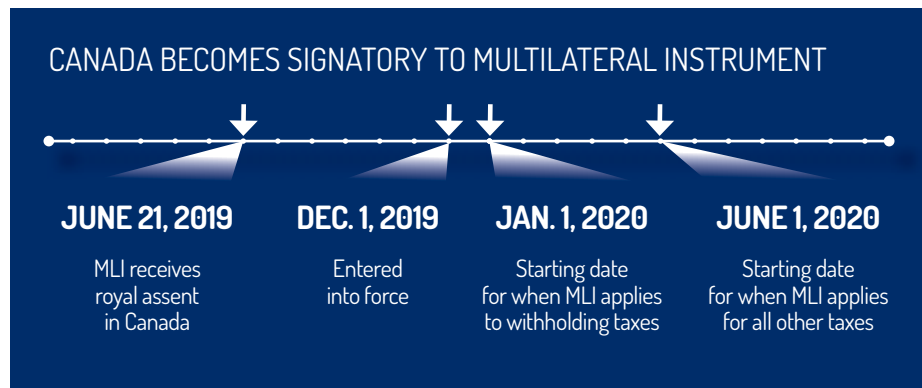
“While some businesses are fighting this, others may just be willingly complying,” Kreklewetz adds. For example, PayPal announced in 2018 that it was subject to an RFI and would be complying with the order.

Marley notes that “Canada is certainly at the high end” of where tax disputes are seen among multinational corporations.

“Countries like India or Canada tend to be quite aggressive from an audit perspective, which tends to then lead to more tax disputes than in a number of other countries,” Marley says. This may be due to the complexity of the Canadian tax regime, the aggressiveness of auditors or

“OVER TIME, WE’LL EVENTUALLY GET CERTAINTY WHEN CASES GO TO COURT, OR WE SEE HOW BROADLY OR NARROWLY THE CRA DECIDES TO INTERPRET THE [MLI’S ANTI-AVOIDANCE] RULE.”

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“YOU HAVE A CONTINUING AND EVOLVING LANDSCAPE AS TO WHAT TREATIES... THE MLI APPLIES TO. SO, THERE NEEDS TO BE A CONSTANT MONITORING BY TAXPAYERS...”

Darren Hueppelsheuser OSLER HOSKIN & HARCOURT LLP

an intransigence to settle disputes with other countries, he says.

Transfer pricing

Transfer pricing — an accounting and taxation practice that allows for pricing transactions internally within businesses and between subsidiaries

that operate under common control or ownership — is a way in which companies can shift tax liabilities to low-cost tax jurisdictions. It has recently come under increased focus from global tax authorities.

“The genie has really escaped from the bottle on that,” says Kreklewetz, as governments and regulators review and challenge transfer pricing decisions that were made as

long ago as 1997, “when most of the current rules were put in place.” Recent events such as the Panama Papers scandal have elevated the importance of how taxable income is treated across the globe and has led to increased public pressure on the authorities to act, he adds.

“I guess you can say that governments, while slow moving at times, are not completely oblivious to what is going on around them,” Kreklewetz says.

“Canada, and its MLI partners, are keenly aware of the size of potential revenues that come with stopping this form of tax loss,” he adds. “The OECD has conservatively estimated that annual losses range from four per cent to 10 per cent of global corporate income tax revenue, between \$130 [and] \$313 billion per year — and Canada and CRA want their slice of the pie!” ■



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Richard is nationally and internationally recognized for his proficiency and expertise on the use of Manitoba limited partnerships in structuring commercial transactions, including the creation of investment and private equity funds. Bradley previously practised in the Toronto office of one of Canada's largest national law firms and has extensive experience in commercial transactional work and in advising private equity and venture capital funds. Both Richard and Bradley will continue to assist clients from across Canada with their local legal needs.

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