

Public M&A 2020

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Public M&A

2020

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Lexology Getting The Deal Through is delighted to publish the third edition of *Public M&A*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Australia, Bulgaria, Greece, Israel, Nigeria and Sweden.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Alan M Klein of Simpson Thacher & Bartlett LLP, for his continued assistance with this volume.



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Cross-border M&A: the view from Canada

Ian Michael

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Canadian M&A by the numbers

Although the ongoing impact of the coronavirus pandemic on M&A markets has shattered predictions and rendered 2019 data more historical than ever, a short review of the data on the Canadian M&A markets in 2019 is still a useful baseline-setting exercise. One enduring key to understanding Canadian M&A market statistics is to appreciate the relatively small number of large and domestic acquisition targets. Global M&A market activity in 2019 continued a trend of strong (almost even with 2018) total deal value but with continued modest declines in worldwide deal count (to multi-year lows). Historically, Canada's M&A markets have not been able to track the global trend to mega-deals but not in 2019 for the first time in many years. In 2019, the total announced Canadian deal value increased materially from US\$247 billion in 2018 to US\$332 billion in 2019 with the number of announced transactions involving Canadian buyers and sellers falling from a record high of 3,415 in 2018 to 3,227 in 2019, a decline of 5.5 per cent. Notably, Canadian M&A transaction data was skewed in the fourth quarter when 18 large transactions were announced with a total value US\$106.2 billion – the second-largest quarterly deal volume in six years.

While 2020 is now highly unlikely to produce much in the way of trend-worthy data, historical data suggests that 2019's fourth quarter splurge of large M&A transactions is anomalous. The role of mega-deals in the global M&A environment and their relative importance for large-scale investors and financial and legal advisers alike, will continue to be less common in the Canadian M&A market, even after taking into consideration Canadian involvement in outbound transactions.

Consistent with a generally applicable 1:10 relationship with the United States, the Canadian market typically still regards transactions valued at over US\$1 billion as mega-deals as compared to a US\$10 billion threshold (if not greater) in US or global markets. The general observation of note is the relative importance of mid-market deals in Canadian M&A. From a global perspective, Canadian mid-market deals are more likely regarded as lower mid-market transactions. Transactions with enterprise values below US\$250 million routinely make up an overwhelming majority of the transactions in the Canadian M&A context. For example, in the fourth quarter of 2019, transactions with values of less than US\$250 million accounted for 86 per cent (90 per cent in Q4 2018) of total announced Canadian M&A transactions.

Larger transactions still also play a material role in Canadian M&A (as Q4 2019 demonstrated well) but often these larger transactions have been disproportionately associated with Canadian outbound transactions led by Canada's large and experienced direct-investing pension funds, large infrastructure investors and utilities operators who are looking for large-scale investments beyond their comparatively smaller home markets. Again, however, the fourth quarter of 2019 provides a notable caveat to this general observation. Of the 18 transactions

involving Canadian companies announced in the fourth quarter, with deal values in excess of US\$1 billion, only three involved large Canadian pension funds and one of those three involved a domestic target. Interestingly, another four of these 18 large transactions were sales of foreign subsidiaries by Canadian parent companies to foreign buyers (including the very largest of these transactions, TD Bank's sale of TD Ameritrade to Charles Schwab for US\$37.8 billion).

Notwithstanding the size of the sell-side transactions in 2019, the outbound segment of the Canadian M&A market remains significant. In the fourth quarter of 2019, Canadian companies acquired 198 foreign targets, exceeding, as has been the case for some time, the number of Canadian targets acquired by foreign buyers in number and value.

Canada's most common cross-border M&A partner tracks its close trading relationship with the United States. In 2019, 63 per cent (60 per cent in 2018) of cross-border Canadian transactions were between Canadian and US parties. Given the significant difference in the size of the Canadian and US markets, it is notable that there is a consistent trend that Canadian-US cross-border M&A activity involves far more acquisitions by Canadian companies of US targets, than US acquisitions of Canadian targets – by a 1.5:1 margin (2:1 in 2019).

Political events

Cross-border political events continued to be dominated by the same issues not yet resolved from the year prior, in particular Canada's relationship with the United States and the United States' economic tensions with China. In 2019, the daily strain of the semi-public negotiation of a revised free trade agreement with the United States and Mexico (and tariffs on steel and aluminum from Canada imposed on the premise of national security risk) gave way to prolonged (and still uncertain) implementation processes in all three countries. The final phases of implementation are now potentially at risk as the coronavirus pandemic interferes with trade priorities and stokes protectionism on emergency grounds. The revised trade agreement between the United States, Mexico and Canada, if left intact, may help provide some certainty for businesses to plot their post-pandemic recovery strategies. North American free trade may find itself the beneficiary of a resistance to the further globalisation of supply chains following coronavirus induced distrust of global supply chains.

Separately, the continued economic tensions between the United States and China in 2019 had a continued and adverse impact on the Canadian M&A market. Incremental settlement discussions between the United States and China, if successful, threaten to eclipse Canadian and Chinese trade and M&A opportunities, especially if the US extradition request regarding Meng Wanzhou, chief financial officer of Huawei and daughter of its founder, is not resolved to the satisfaction of the Chinese government. The United States has not yet shown any signs of relaxing

its campaign against Huawei's participation in 5G technology roll-outs or its alleged international trade compliance issues.

Canadian M&A with Chinese buyers has fluctuated for a variety of reasons (eg, energy prices, currency controls, mineral prices) over the past decade but it has persisted in its importance and potential. However, the continuing trade tensions between the United States and China and the technology tensions between China and Western-based technology hubs have contributed to a deepening trend of fewer and smaller inbound M&A transactions to Canada from China as compared to prior years. The reduction in such transactions in the United States has also been dramatic and enduring following the first full year of enhanced approval processes being implemented under the Committee on Foreign Investment in the United States, which had already proven challenging for China-related transactions. All outbound investment by China in the first half of 2019 fell by 73 per cent from already reduced rates to reach a seven-year low. Total inbound investment to China also fell by 42 per cent in the first half of 2019 (to the lowest level since 2015). As part of a four-year trend, announced transactions from China and Hong Kong into Canada fell between 2018 and 2019, from 25 to 17 in number and from US\$2.64 billion to US\$1.57 billion in value. If the largest of the 17 China to Canada announced transactions in 2019 is removed, less than US\$500 million of total deal value would be shared among the remaining 16 transactions and represent the lowest levels of China-Canada M&A in over 15 years. The ongoing tension over Huawei's participation in 5G technology in many Western countries coupled with the prolonged extradition proceedings in Canada involving Meng Wanzhou will continue to generate headwinds, but not absolute barriers, for Canada-China M&A transactions. International humanitarian cooperation in the context of the coronavirus pandemic has not provided any relief from these economic and political tensions.

The year 2019 also saw another federal election in Canada with the Liberal party, under the continued leadership of Justin Trudeau, winning the right to form the government but only with a minority of the elected

seats instead of its previously strong majority. The governing Liberal party must find allies in the other major parties to pass legislation. It has more than one option to choose from and different solutions will apply to different files. The covid-19 pandemic has resulted in a resurgence in federal leadership opportunities and a 'war cabinet' mentality that has smoothed off partisan edges to date. Like most countries in the world, even recent priorities have been nearly entirely displaced by the immediate needs of confronting massive public health and economic issues.

Industry matters

Following on the rapid rise of cannabis-infused M&A activity in Canada in 2018, when even the stock of available public company shells for proposed reverse takeover transactions was becoming a hindrance to the pace of US businesses going public through M&A in Canada, pricing pullbacks in the equity markets dampened further M&A activity in the cannabis industry in the latter half of 2019. Strategic reviews among some cannabis entities that may have struggled to reach their initial goals have begun, which may result in an echo of prior M&A activity as consolidation strategies are accelerated in 2020.

In addition to sharing in the worldwide impact of the coronavirus pandemic, Canada, and in particular the province of Alberta, has at the same time been adversely affected by the sudden and dramatic fall in the price of oil. The one-two punch received by Canada's oil industry comes at a difficult time, as the industry has not yet fully recovered from the low oil price environment that started in late 2015. In addition to oil price challenges, Canada's oil industry has not been able to obtain better access to undiscounted world market prices owing to continuing legal challenges to infrastructure developments of national importance such as pipelines and port facilities.

Notwithstanding these current challenges, the Canadian M&A market has proven to be resilient in the face of challenges before and Canadian buyers will continue to be active in the international market place.

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