

Introduction

As the second decade of the 2000's comes to an end, we present, for the benefit of our clients and friends, what we think are some of the most important legal developments from the past year that are likely to be of interest to business. Some of these developments are in their infancy or are looming on the horizon.

Corporate: Public M&A, private equity, mining, governance and compensation

In relation to public M&A activity, hostile bid activity continues to be lower than expected, continuing a recent trend of sparse unsolicited offers since the 105-day minimum deposit period and mandatory minimum 50% tender condition were introduced in May 2016. It is unclear whether the 2016 bid amendments have caused the decline, but they may be a contributing factor. Other factors may include a decrease in the number of listed companies and economic challenges in the natural resources sector.

Over the past year, mini-tenders (i.e. an offer to acquire less than 20% of the shares of a class of an issuer) have been used by dissident shareholders to disrupt two high-profile M&A transactions – namely, Catalyst's acquisition of Hudson's Bay Co. shares at a premium to a proposal to take the company private, and the Mach Group's offer to acquire Transat shares in an attempt to vote against Air Canada's proposed acquisition of Transat. The latter was subsequently ruled to be abusive by the Quebec regulator, but properly structured, a mini-tender can be a legitimate tactic for challenging a transaction or attempting to win a proxy contest.

Meanwhile, we are awaiting the results of an appeal from the Yukon trial court's decision in *Carlock v. ExxonMobil Canada Holdings ULC*, which awarded dissenting shareholders a 43% premium to the negotiated deal price in ExxonMobil's 2017 acquisition of InterOil. If the lower court decision is not overturned, we may see more shareholder dissents in future.

Finally, the use of soliciting dealer arrangements in Canada – where issuers pay fees to investment dealers to get securityholders to vote in favour of or support certain actions – was the subject of a Guidance Note from IIROC. The Guidance Note provides welcome clarity on the use of such arrangements in the context of takeover bids, plans of arrangement, proxy contests and other transactions involving various types of solicitation fees.

In the private equity space, 2019 year-to-date activity levels in Canada are strong, exceeding 2018 levels for the same period. Sponsors participated in a range of private offerings and capital raising transactions. A number of new offerings raised fresh capital from first-time funds. Co-investment arrangements continued to be attractive. Requirements for enhanced fee and fund expense disclosure in the US became a focus. Infrastructure investments remained a staple for institutional investors. Deals were completed quickly, with fewer surviving indemnity obligations for sellers. Given the levels of capital still requiring deployment, the environment is favourable for another active year in 2020.

In the mining sector, 2019 started off with two of the largest Canadian mining M&A deals in recent memory (Barrick/Randgold and Newmont/Goldcorp). However, despite this strong start, global economic uncertainty persists and capital has not returned to the mining industry. Public financings in 2019 were generally limited to capital raising by producing issuers or royalty/streaming issuers. Exploration companies had limited financing opportunities. In addition, global M&A activity for the year was materially down compared to prior years and the anticipated mid-tier consolidation remained elusive. In such a challenging market environment, creativity was often critical to getting deals done.

In 2019, a number of ongoing developments in Canadian corporate governance moved forward. These include environmental, social and governance (ESG) matters, such as board diversity initiatives and climate change disclosure. The Ontario Securities Commission's (OSC) delivered its long-anticipated report on regulatory burden reduction. Developments in the U.S. regarding the regulation of proxy advisory firms may also lead to further consideration of that issue in Canada.

Several 2019 developments will have a significant impact on executive compensation practices in 2020. These include proposed changes to taxation of stock options, the enactment of the federal *Pay Equity Act*, amendments to the *Canada Business Corporations Act*, new U.S. hedging disclosure rules and a review of automatic securities disposition plans.

Public policy and regulatory

In the area of white collar and capital markets regulatory enforcement, Ontario announced the launch of its Serious Fraud Office, as well as a review of its *Securities Act*. British Columbia announced that a number of new enforcement tools will be added to its *Securities Act*. Enforcement activity levels were slightly lower relative to last year, with a slight increase in fines and administrative penalties, and a notable increase in restitution and disgorgement orders. In contrast, the effective use of the newly introduced “remediation agreement” has been threatened by high profile events involving SNC-Lavalin.

Financial services regulatory reform is continuing to focus on market conduct and consumer protection across the financial services sector. Policy makers have been actively promoting not just changes in law, but significant reform to the regulatory framework and approach to regulation. Two new regulators in Ontario and BC commenced operations, each with a mandate to foster consistent and effective regulation across Canada. We see a trend towards regulatory harmonization among jurisdictions, financial service providers and financial services and products.

Newly-appointed Competition Commissioner Matthew Boswell's priorities are emerging: enforcement in the digital economy and the detection and review of non-notifiable mergers. The Competition Tribunal recently confirmed in the *Vancouver Airport Authority* case that business justification for conduct is the paramount consideration in an abuse of dominance case. And, in *Godfrey*, the Supreme Court of Canada (SCC) revisited and reset the ground rules governing collective relief for consumers in Canada seeking damages for anti-competitive harm.

Amendments to the Ontario *Construction Act* (formerly the *Construction Lien Act*) took effect in October 2019, introducing a prompt payment and mandatory adjudication regime in an effort to alleviate perceived payment delays down the construction pyramid. The development industry in Ontario is revising internal processes and re-drafting contracts to address the new rules, and will be grappling with the inevitable growing pains for some time. A growing number of other jurisdictions in Canada, including the federal government, are following Ontario's lead.

In other news, Canada finally made good on its promises to modernize its intellectual property (IP) rights registration system through key amendments to the *Trademarks Act*, the *Patent Act* and their respective regulations. The government's objective is to make investing in Canadian IP as competitive and frictionless as possible. The next step is for the Canadian government to implement an ambitious experimental IP strategy.

Cannabis also continues to be a big story on both sides of the border. In Canada, the newly-legalized market experienced some growing pains, including initial distribution and supply chain issues. Provinces and territories considered changes to the age of consumption, as well as their retail licensing, distribution and wholesale models. Federally, Canada legalized three new classes of cannabis products: edibles, topicals, and extracts. Product liability and securities litigation began to emerge in the wake of adverse events allegedly relating to consumers vaping illicit cannabis products and of declining share prices. M&A activity and market consolidation are likely in 2020.

U.S. and cross-border

In the United States, cannabis is legal for medical use under state law in more than 30 states, and even for adult recreational use in more than 10 states. However, cannabis continues to be illegal under federal law in all states. Hemp is no longer prohibited under the federal *Controlled Substances Act* but may be regulated by the federal Food and Drug Administration. We are monitoring several legislative initiatives that may bring greater clarity to this issue.

In 2019, the U.S. Securities and Exchange Commission continued working to simplify public company disclosure requirements. The popular “test-the-waters” rules for emerging growth companies are now available to all companies, and there was focused attention on the role of proxy advisory firms in the U.S. proxy process.

Global efforts towards international tax reform moved forward. The Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (MLI) entered into force in Canada. The MLI amends many of Canada’s bilateral tax treaties. Additionally, if adopted, proposals from the OECD to alter the manner in which global profits are allocated among countries – “BEPS 2.0” – will expand the taxing rights of market jurisdictions (Pillar One) and impose a global minimum tax on multinational enterprises (Pillar Two).

Litigation and key cases

Growing tensions between federal and provincial legislators in relation to the power to regulate the environment are coming to a head in two court proceedings. The B.C. Pipeline Reference Case raises questions about the scope of a province’s power, in the guise of protecting the environment, to regulate a federal undertaking (an interprovincial pipeline). And, amid concerns about impacts on provincial economies, the Carbon Tax Challenges by certain provinces seek to invalidate the federal carbon pricing regime. Both disputes are headed to the SCC in 2020.

The SCC heard and/or granted leave to appeal in a number of other cases that could have a significant impact on Canadian business. Three will address the developing doctrine of good faith performance in contract. Others deal with diverse matters such as arbitration clauses, the application of the Canadian Charter of Rights and Freedoms to corporations and the enforceability of provisions that impose penalties triggered by the insolvency of a contracting counterparty. The law in each of these areas could be clarified by Canada’s top court in 2020.

The Ontario Court of Appeal’s decision in *Chevron Corporation v Yaiguaje et al* confirmed the very high test under Canadian law for disregarding the separate legal personality of a parent corporation and its direct or indirect subsidiaries. The Court rejected attempts to introduce into Canadian law either a general equitable test for piercing the corporate veil or a form of group enterprise liability. The SCC’s determination not to hear an appeal from this decision effectively brought an end to a lengthy Canadian proceeding seeking to seize the assets of an indirect subsidiary to satisfy a judgment obtained (fraudulently) against its parent. This may be welcome news for defendants in other cases pending before the Canadian courts that seek to pierce the corporate veil to render one member of a corporate family accountable for acts of another.

Technology, innovation and privacy

Privacy continued to be at the forefront of regulators’ and business-leaders’ minds alike. Reports of data breaches increased exponentially in the first year following mandatory breach notification, as did efforts by businesses to develop breach incident response plans. Regulators are re-examining privacy protections

in the context of the “digital age”, as all levels of government call for regulatory reform. International regulators committed to increased cooperation, affirming their view that privacy is a fundamental human right. And California became one of the first States to enact its own privacy statute, leading to renewed lobbying for a federal regime in the US.

The development and adoption of new technologies in mainstream businesses continued to accelerate in many vertical markets. Opportunities relating to innovation in artificial intelligence (AI), and machine learning in particular, continue to grow, spawning increasingly active debate about regulation to ensure the ethical use of AI. The adequacy of Canada’s privacy regime in this context is also under scrutiny. Strategic alliances for the introduction of new products and services are rapidly forming, raising novel considerations regarding how to address risk allocation in these innovative arrangements. In the financial services sector, efforts are underway to modernize the payments system and to move forward with open banking. Clients in bricks-and-mortar businesses such as real estate and infrastructure are starting to recognize and embrace the opportunities presented by new technologies. Interest in public blockchain, however, is declining.

Cryptoassets made headlines in Canada in 2019, and not always for the best reasons. Early in the year, the QuadrigaCX cryptoasset trading platform went bankrupt, leaving 75,000 customers facing a collective loss of potentially more than C\$200 million. Investigation revealed a complete absence of financial controls, apparent misappropriation and misuse of customer assets, and other questionable business practices. Shortly afterwards, Canadian securities regulators proposed a framework for regulating cryptoasset trading platforms. In July 2019, the federal government published final regulations that will subject dealers in virtual currency to Canada’s primary anti-money laundering legislation. In October 2019, a panel of the Ontario Securities Commission (OSC) directed the issuance of a prospectus receipt for The Bitcoin Fund, which could become the world’s first publicly traded bitcoin investment fund.

Other big issues do not feature as prominently in this year’s publication as they have in past years – climate change and international trade, for example – but you will almost certainly hear more about them next year.

With all of this in the mix, 2020 is poised to be an eventful year. We will monitor developments as they unfold and would be happy to discuss them with you.

EDITOR



Jacqueline Code

Partner, Research

jcode@osler.com

416.862.6462