Navigating the changing business and foreign investment landscape in 2021

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2020 has redefined the Canadian legal and business landscape. Many of the Canadian governmental public health measures created to limit the spread of COVID-19 have disrupted several areas of business and investment. Companies investing in Canada will need to consider the potential implications of the following trends:

- A tightening of Canada’s foreign investment approval processes;
- An updated approach to dispute resolution; and
- An increased focus on companies’ environmental and social governance responsibilities

Securing foreign investment

Canada has traditionally prided itself on being an open trading economy; foreign investment and international trade have always been determining factors in the health of the Canadian business economy. Having said that, Canada was one of the first jurisdictions to establish a formal foreign investment review process, now contained in the *Investment Canada Act* (ICA) and so has had considerable experience in the regulation of FDI compared to other jurisdictions such as the EU and UK, which have more recently instituted screening of certain types of foreign investments. Foreign investors must now grapple with new barriers to entry due to increasingly stringent governmental approval mechanisms, consequently pushing them to become progressively more agile in deal planning and execution.

The global shift towards protectionism in major parts of the global economy in recent years has been exacerbated by the current health crisis resulting in uncertain foreign investment opportunities. As in many countries, the extraordinary circumstances around COVID-19 led to fears (substantiated or not) that Canada’s financial markets and economy were exposed to opportunistic acquisitions of sensitive Canadian targets. Accordingly, on April 18, 2020, the Ministry of Innovation, Science and Industry issued a policy statement indicating that certain foreign investments (primarily but not exclusively those involving state influenced or owned investors) that fall under ICA would be subject to enhanced scrutiny in the aims of supporting Canada’s economy during and after the pandemic: “the Government will also subject all foreign investments by state-owned investors, regardless of their value, or private investors assessed as being closely tied to or subject to direction from foreign governments, to enhanced scrutiny under the Act".[1] For instance, there are more significant concerns around Chinese foreign direct investment, which have taken on broader geopolitical dimensions. In addition, the federal government also enhanced its scrutiny of foreign acquisitions of Canadian businesses engaged in the supply of critical goods and services to Canadians or in activities related to public health. This was in addition to its already broad powers under the national security review provisions of the ICA.

Onshoring and supply chain diversification have accelerated in 2020, and are expected to be longer term trends over the next few years. The intensification of trade protectionism worldwide has increased, seen in the number of trade remedy disputes (i.e. anti-dumping, anti-subsidizing disputes). Canada falls in line with this trend, having increased its use of trade remedy measures and making legislative and policy changes to favour their effectiveness and enforcement. As a party to the newly enacted USMCA, Canada now has a functioning state-to-state dispute settlement mechanism, a key change from the former NAFTA.

The issue for each jurisdiction is to determine the value and effect of each new economic endeavour on protected business sectors. Canada remains open to investments that benefit Canadians while taking the necessary measures to help protect its national security and its economic integrity.

Foreign investment, industries and regions on the rise in 2021

Investment from the United States, Canada's strongest trading partner, will continue to grow in 2021. There will also be opportunities in the European market through Canadian trade agreements, now largely in place across the continent. In the aftermath of Brexit, The U.K. will be looking to secure international trade agreements as well, making Canada a natural trade and investment partner moving forward.

Canada has been gaining recognition as a growing foreign investment destination for technology by successfully creating industry city hubs in areas such as R&D, AI and biotech. However, these same industries pose potential national security concerns. Foreign investors will have to look at these considerations if they are looking to engage within the Canadian market.

COVID-19 has accelerated changes in consumer behaviour by encouraging virtual shopping. Companies that have aligned themselves with these trends in the digital economy will do well in 2021. For example, Shopify's online merchant platform offering overtook the Royal Bank of Canada to become Canada's most valuable public company, signalling substantial growth in this area.

Canada's largest financial institutions are rapidly expanding their online digital capabilities and their use of artificial intelligence including buying or partnering with smaller successful Canadian or foreign technology developers. New fintech companies have had tremendous success and growth in 2020 with strong user-friendly online financial services offerings anchored in a robust digital marketing strategy. This trend will surely continue in 2021.

Finally, the cannabis industry is an interesting area to watch as a potential comeback story in 2021. It has been a tough time for the industry over the past year, but legalizing cannabis in Canada allowed the country to emerge as a global player by building a strong base of expertise in this sector. The opportunity for cross-border activity with the U.S. has also presented itself through favorable voting related to de-criminalization of cannabis, in the recent U.S. elections.

ESG practices as a prerequisite to doing business in Canada

Investors interested in Canadian business right now must be cognizant of environmental social governance (ESG), and ESG-related issues, as they are becoming important focal points to access Canadian capital. Large institutional investors that have established ESG criteria as an important prerequisite to investment are driving this trend. ESG will be a critical issue to consider for any business looking to raise capital in Canada. To demonstrate how important this has become in the Canadian economy, Brookfield, one of Canada's largest real estate infrastructure asset managers, recently appointed Mark Carney, former governor of the Bank of England and the Bank Canada, as its Vice Chair and Head of Impact Fund Investing. We have also recently seen an important increase in large green bond offerings by some of the large major banks. Both examples are clear signs of the importance of ESG for business in Canada moving forward.

Improved disputes environment and future implications

Canadian courts have been relatively resilient in their response to the pandemic following an initial period of uncertainty in early March. Most courts pivoted operations to virtual hearings within a matter of weeks to ensure a seamless continuation of services. If faced with litigation in Canada, companies can be assured that Canadian courts are open for business, albeit with some limitations on efficiency and operations. Some courts, such as the Commercial Court in Toronto, and all arbitration venues, were able to course correct rapidly. They determined early on that commercial courts and arbitration venues could not simply close, as parties with important business disputes would continue to require adjudication and resolution to ensure business continuity and limit business disruption during this uncertain time. Recognizing that business will continue to require dispute resolution services, the courts adopted new virtual procedures for court hearings. Virtual hearings are now available for chambers appointments, motions, applications, trials and appeals, in most provinces. Parties are able to file court materials electronically and counsel can appear before the courts through virtual platforms such as Zoom.

The pandemic has, in some ways, reduced the time that counsel spend waiting for court hearings, and also enabled parties across the country to participate in proceedings without incurring the costs of travel. These changes have improved the efficiency of the court process and improved access to justice. Recognizing the improvements made, a number of Canadian chief justices have stated that many of these changes will remain in place moving forward.

Key considerations for businesses to adapt and prepare for the evolving Canadian landscape

The impact of the pandemic on business has not been entirely negative; some sectors have experienced unprecedented growth. Although there is a degree of commercial activity that continues to take place, namely big ticket M&A, the reality is that the pandemic along with regulatory requirements have made the investment climate particularly tricky. Although transactions will continue to happen virtually, they will be unpredictable in the near future. Nonetheless, the ability to engage in virtual dispute resolution will be indispensable in dealing with the quickly changing foreign investment landscape in Canada. It is critical for foreign investors to get a handle on the regulatory and business landscape in their initial planning and to be prudent with business advice when considering how to approach potential investments into Canada.

For more information on investing into Canada, or to discuss any of the topics referenced in this article, please reach out to any of our Key Contacts shown below.

[1] Policy Statement on Foreign Investment Review and COVID-19

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