

Chasing Tech Work, Canada's Law Firms Embrace Innovation

By Julie Triedman, *The American Lawyer*, October 29, 2014



Photo by Markian Lozowchuk - Osler corporate partner Chad Bayne

George Takach, a veteran technology partner at McCarthy Tétrault, one of Canada's largest firms, recalls cringing one day when he landed in Toronto's Pearson International Airport after a trip to Sweden. Stockholm's airport had been lined with displays touting Swedish industrial achievements, he says. The Pearson airport emphasized Canada as a tourist getaway: "blank gray walls, and a video showing a bush plane landing on a lake, with a backdrop of trees and rocks," he says.

Takach is among the most senior of a circle of lawyers who are advising, facilitating and cheering on Canada's resurgent—if sometimes overlooked—tech industry. (He feels so strongly about Canadian tech that in 2012 he made a bid to lead the country's Liberal Party on a promise to push Canadian innovation to the fore, although he ultimately withdrew and endorsed candidate Justin Trudeau.)

Many of those lawyers, from firms including McCarthy but also Osler, Hoskin & Harcourt; Blake Cassels & Graydon; Gowling Lafleur Henderson; and boutiques like LaBarge Weinstein, cut their teeth in the 1990s, when a previous generation of Canadian tech companies, including telecom giant Nortel Networks Corporation and smartphone maker Research In Motion Ltd. (now known as BlackBerry Ltd.), first put Canada on the map for world-class electronics, networking and mobile technology. Now, more than a decade after the dot-com crash ended that boom, [a new generation of tech startups](#) is flowering across Canada—and keeping lawyers busy.

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Though Canada attracts only a fraction of the tech investment that Silicon Valley does, or even New York City, the amount of venture capital pouring into Canada is increasing. Last year, Canadian emerging companies drew \$1.8 billion in venture capital, up by more than half since 2011, according to Thomson Reuters; investment rose again this year, with \$821 million invested in the first half of 2014, 8 percent more than the same period in 2013. (VC investments last year in Silicon Valley totaled \$12.3 billion; in New England, \$3.4 billion; and in New York City, \$3.1 billion. All dollar amounts in this article are in U.S. dollars.)

The range of new Canadian ventures is dazzling, from Kiwi Wearables Technologies Limited, a technology that lets developers build motion recognition into software products, to OTI Lumionics, whose founders invented an organic light-emitting diode with possible applications in clothing, furniture and lighting; to Toronto's TopHat, a platform that helps teachers turn students' mobile phones into learning tools. Ventures that have achieved global traction include Vancouver-based HootSuite Media Inc., whose technology allows users to combine multiple social networks into an integrated dashboard, and Shopify Inc., an Ottawa company with an e-commerce platform that brick-and-mortar stores can use to create online retail businesses.

Within this newly energized innovation economy, Canadian lawyers are playing roles far beyond incorporating a company or papering term sheets. They're opening their client networks, serving as matchmakers between the engineer-founders and potential sources of investment. At entrepreneur boot-camps and inside high-tech accelerators, they're offering business guidance and low-cost ways to create and file essential legal documents. Most firms are ditching the billable hour, at least initially, and one firm is even taking equity as payment.

"We're trying to make bets," says Osler partner Chad Bayne, "to find the one or two or three or four startups that are most promising and get them to the place where they can go public, where fees increase in orders of magnitude or a company starts acquiring others."

But it's not all about the potential payoff. Once they started getting involved with startups, these lawyers say, they found it very fulfilling—more so, in fact, than many of the huge, sexy deals their big firms are famous for. Clients are young, or young at heart, with exciting ideas and big dreams. They're looking for business counsel as well as help with a core set of documents.

In the end, "what's most gratifying is to advise people at a time when they really need the advice," says LaBarge Weinstein's Deborah Weinstein—who left the fast track at one of those big firms and started a new firm that lets her work with young tech companies to her heart's content.

Weinstein caught the tech bug as an overworked new partner and new mother at Blake, Cassels & Graydon's Ottawa office. In 1993, her twin daughters' first year, Weinstein was lead adviser to the issuers on five giant Canadian tech IPOs. "I basically came home, kissed my babies, and handed them back to my husband," she says. In the late 1990s, when those same companies

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began spinning off new enterprises, the executives at the new ventures looked up Weinstein. The next few years were busy with financings, M&A and the full spectrum of legal work.

Weinstein "was a rock star," recalls Brock Gibson, Blakes' current chair. Still, the pace was grueling. And Weinstein's startup clients—the ones she loved working with and who really needed her advice—couldn't afford her. "I wanted to invest in them," says Weinstein, "and more importantly, I wanted to be more creative in how they paid us. They couldn't pay \$5,000 in legal fees, let alone \$80,000." Blakes, like its peer firms, frowned on accepting equity as payment—although Weinstein knew that some Silicon Valley firms, including Brobeck, Phleger & Harrison; Wilson Sonsini Goodrich & Rosati; and the Venture Law Group, were investing in clients. Representing startups at a traditional big firm "was like a square peg in a round hole," Weinstein says—and she wanted more control over her time.

Weinstein and a tax colleague, Paul LaBarge, launched the new firm, LaBarge Weinstein, in 1997. That first week they helped an Ottawa semiconductor startup called Skystone Systems with a financing; by the time Cisco Systems Inc. acquired the company several months later for Cisco stock with the new firm's help, Cisco's value had ballooned. The firm's fees, which had been paid in equity, were now worth five times as much. "We knew we had something," Weinstein says.

"Our competitors would say we're in a conflict of interest situation," says Weinstein. Presumably the temptation would be to maximize share prices. "But we're not," she says, "and in fact clients see us as aligned with their interests." Weinstein says that her firm as a rule doesn't make investments of more than about \$10,000 in billings in any one startup client. Eighteen years later, the 23-lawyer Ottawa-based firm has roughly 2,000 active clients, double the number it had in 2008. Four out of five clients are in very early to early stages of growth; clients also include 15 public companies that the firm first advised as startups. The firm represents a few of the biggest recent Canadian successes, including Ottawa-based Shopify, the e-commerce giant recently valued at \$1 billion; LaBarge Weinstein recently handled Shopify's largest round of financing to date, a \$100 million investment led by OMERS Ventures last November.

Not all of LaBarge Weinstein's involvements are in the technology sector: partner Michael Dunleavy, for example, is board chair of Standard Innovation Corporation, a maker of high-tech "adult sexual wellness devices" like the We-Vibe. "That makes for a lot of laughs at board meetings," he says. One of Canada's fastest-growing medical-marijuana startups, Ontario-based Tweed Marijuana Inc., listed on the Toronto Stock Exchange with LaBarge Weinstein's help in May.

Dunleavy, a prolific business generator himself, joined from McCarthy in 2000 after a stint at Torys. Both firms had well-regarded tech practices, but lawyers were expected to jump into any large M&A deal when needed. Also, he felt the work was too narrowly framed. At McCarthy, "when the term sheet landed on your desk, you were just expected to paper it," he says. At

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LaBarge Weinstein, "we're engaged at a very early stage, and they're asking us, 'what kind of terms should we negotiate for?' "

Though the firm now takes equity in fewer than 5 percent of clients, Dunleavy says, the firm bends over backwards to be flexible about fees. Billing is deferred on a basic package of documentation, which may include shareholder agreements, incorporation, nondisclosure and stock restriction agreements, privacy policies and web terms. Advising on transactions is where the investment pays off; the firm sends a bill "when they do a financing, or when they start to see positive cash flow," Dunleavy says. "We try to keep track of WIP," work in progress, though occasionally a company fails and the firm isn't paid. But if the relationship remains solid, "that founder will come back with a new venture."

In keeping with its mission to maintain low rates, the firm's offices, located in a gleaming suburban tech campus built by the tech investor Sir Terence Matthews, are modest. The firm spends little on advertising, relying on word-of-mouth referrals and its lawyers' ubiquitous presence at tech events as well as its own brand of guerilla marketing.

"We have the reputation for being the guys who throw the party at the pub after the conference is over," Dunleavy says. "People remember that better than they remember who sponsored the conference." The firm keeps a refrigerated beer keg dispenser on hand for regular local gatherings—like one on a recent sunny September afternoon, when a mix of running shoe-clad engineers, angel investors, lawyers and one banker gathered inside LaBarge Weinstein's eighth-floor conference room to hear Richard White, a longtime client of Weinstein's, talk about lessons he had learned in his several serial ventures. They chatted amiably, exchanging contact information, checking their iPhones and sampling from a bucket of snacks—Chips Ahoy, Pringles and trail-mix bars.

Among attendees was Dunleavy client Abdul Haseeb Awan, the Pakistan-born founder of Ottawa's BitAccess Inc. His innovation—an ATM for bitcoins—is already operating in 20 cities since he founded the company just 9 months ago after getting mentoring and seed money at the Silicon Valley accelerator Y Combinator. He found Dunleavy via word of mouth and is looking for help in the next round of funding. "You need to have people you can trust," Awan says. "You cannot screw up your lawyer or your accountant."

Such tech-related networking events are held almost daily in Toronto and nearby Kitchener-Waterloo, and at local tech accelerators. That's how Kerry Liu got to know his lawyer, Osler's Bayne. Liu reached out to Bayne even before his company, Rubikloud Inc., was created; Bayne later advised the company, which helps businesses make money off of their sales data, when it was housed at Toronto's newest accelerator, One-Eleven, before its staff outgrew the space. Choosing counsel, Liu says, was intuitive: "Are they at the accelerator? Do they go to the events? Do they answer their email at 10 p.m. and don't send you a bill?"

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"The quickest thing we can sniff out is passion," Liu adds, "because we're passionate people."

In Canada's tech sector, as in Silicon Valley, connections matter. Over time, certain key actors reappear as serial inventor, entrepreneur or angel investor—such as Matthews, who founded the telecommunications company Mitel Networks Corporation in 1972, then Newbridge Networks in 1986, and has gone on to invest in more than 100 other Canadian ventures. He and other tech veterans have poured money into Canada's engineering programs and underwritten tech accelerators, often with government and university support, that offer workspace, technical and professional support and business training and mentorship to new tech ventures.

Another key element is the web of relationships between the Canadian and U.S. tech communities. An estimated 350,000 Canadians live in the San Francisco Bay Area, many working in the tech industry, and Canadian startup founders regularly fly to Silicon Valley. Air Canada's four direct flights daily between Toronto and San Francisco are among the airline's busiest routes. Canada's tech expats are now putting their money back into the country's new tech plays: In 2010, a group in San Francisco founded a nonprofit, C100, with a mission to support the development of Canada's next generation of billion-dollar companies.

Likewise, interconnections have seeded the startup lawyering community in Toronto and Ottawa. Takach and colleague Barry Sookman, for example, mentored several lawyers at McCarthy in the late 1990s and early 2000s who have since gone on to successful tech practices elsewhere, including Dunleavy at LaBarge Weinstein and Cheryl Slusarchuk at Blakes. Torys, among the earliest Bay Street firms to build a tech group, was where Vanessa Grant at Gowling Lafleur Henderson and Bennett Jones' Gary Solway and Barry Reiter got their start. Others, like Osler, have [grown new tech practices](#) around a few driven and entrepreneurial partners.

Bayne is among more ubiquitous startup lawyers in Toronto, having lived and breathed Canada's tech ecosystem since he was an undergraduate in computer engineering at Canada's premier engineering school, the University of Waterloo. At Waterloo, engineering undergrads apprentice with companies half the time, a practice that has long given its graduates a head start over their U.S. peers in the job market. (In the late 1990s, Bayne recalls, Microsoft "would back a truck up at the university and hire engineers right off the campus.") During college and after, Bayne did stints at Newbridge Networks—one of the companies founded by Matthews—but in 1998 enrolled in the University of Ottawa's law school on a lark. He joined Osler in 2001, just at the time the firm formally created a tech group in Toronto.

The tech bubble burst later that year, but Bayne kept a hand in the tech market, helping a major venture-fund client make several Canadian acquisitions, then handling deals for the firm's larger tech clients. When the global financial crisis in 2008 wiped out that M&A market, Bayne and a colleague, Geoffrey Taber, still committed to the tech sector, decided to go after startup clients with a potential to grow. "The buy-side market had dried up," Bayne says. "We had to have other sources of work."

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An inflection point in the startup ecosystem came in 2011. That year, the Ontario Municipal Employees Retirement System (OMERS), became the first and only pension fund to start a venture-capital arm, committing to invest \$1 billion over the next several years directly into new Canadian ventures. Also that year, Business Development Bank of Canada rolled out its own venture-capital initiative, and has since put money into 92 Canadian companies and into new Canadian venture-capital funds. OMERS' act of faith, in particular, has triggered steadily larger investments in the sector.

All that has been good business for Osler, which has been tapped on roughly 100 capital raisings. Jordan Jacobs, co-founder and CEO of MILQ, an online social-media curating platform incorporated two years ago, says he reached out to Bayne for advice about financing growth. Accepting venture-capital money meant that the startup would likely have to offer the VC investors board seats and control, as well as preemptive rights to fund future financing rounds. Its two cofounders wanted more flexibility with future financings and in selling their equity. Bayne's advice, to negotiate with a group of angel investors willing to agree to more flexible terms, resulted in a solution that "was fairly seamless," Jacobs says.

The largest capital raising that Osler has handled to date is a \$165 million round last November for HootSuite. The social-media management company is among a half-dozen emerging companies in the \$250 million to \$1 billion range in value that Bayne and Taber hope are headed for the Holy Grail for tech companies: an IPO. "These are likely to be the cornerstone of the next wave of high-tech companies in Canada," Bayne says. In the past year, HootSuite's revenues have more than doubled; the technology is now used in 175 countries, and by 744 companies on the Fortune 1000. At each juncture, it has turned to Osler, working mostly on a fixed-fee basis, with ad hoc matters on an hourly fee basis.

"What's been amazing about Osler is that they now understand that businesses like ours need a new way to pay for legal services," says Paula Pepin, HootSuite's general counsel. "The hourly fee is not working for us. We need ongoing support, and not at \$600 an hour."

Osler and other big firms are exploring ways to make discounted work for startups feasible within the leverage model, pushing work down to associates at a very junior level, or offering flat-fee deals. Pepin acknowledges those efforts, but says that most large firms need to offer more flexibility on rates. "In the end, they're always trying to make up the billings for what was lost in the earliest phases," she says. "They're still counting the billable hours."

Canadians have looked to Silicon Valley for lessons in building technology "clusters." But, Bayne insists, "we're not trying to recreate Silicon Valley. We're trying to create something distinctly Canadian, an integrated startup ecosystem coast to coast here. We want to do great things in Toronto, but also in Montreal, Kitchener-Waterloo, Ottawa and elsewhere."

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A dozen or more tech accelerators have sprung up in all the country's major cities. For law firms, they offer a more consistent opportunity to meet potential startup clients. In just Toronto, for example, Dentons has a free legal clinic inside the accelerator. Osler, along with Bennett Jones, is a founding partner of the accelerator One-Eleven, which currently houses nine startups; Osler also sponsors an accelerator in Ryerson University's Rotman School of Management, the Creative Destruction Lab.

"Not every client that walks in the door will be a billion-dollar company," says McCarthy's Takach, "but some of them will." Takach should know; he helped Constellation Software Inc., now a \$6 billion public company, get off the ground in 1994; it remains a McCarthy client.

The inverse is also true. Takach remembers doing a deal in Europe several years ago and noticing that 80 percent of the lawyers in the room were on their BlackBerrys. Seeing that "really put a jump in our stride" as Canadians, he says. But a few years later, BlackBerry Ltd.'s market share in the smartphone market plunged; it is now a third of one percent.

The company's troubles, though, had a silver lining: a bunch of unemployed BlackBerry people suddenly came into the startup market. "A group of RIM buddies will sit around a pub for a week or two. They say, 'what's next?'" Takach says. "They find a problem, then they go solve it."

And increasingly, Canadian lawyers are right beside them.

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